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NO. 81 6540

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

HENRY ARTHUR DRAKE,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Georgia Rule prohibiting the granting of a new trial on the basis that a witness has recanted his trial testimony denies Petitioner fundamental fairness and due process of law where Petitioner's convictions could not stand without the trial testimony of the witness who has now recanted that testimony, admitted that it was perjured and exculpated the defendant.

II. Whether the imposition of the death penalty on a defendant would constitute cruel and unusual punishment in violation of the Eighth Amendment where the sufficiency of the conviction upon which that penalty was based rests squarely on the testimony of a witness who has now recanted that testimony, admitting that it was perjured, and has exculpated the defendant of the crimes, and where the state has invoked a rule barring a new trial on the basis of the witness' recanting of his trial testimony.

PREFATORY STATEMENT

All references to the trial transcript in this case will be preceded by the capital letter "T" followed by the page reference, e.g. "T.3". All references to the transcript of the Co-Defendant's trial will be preceded by the capital letter "CT" followed by the page reference, e.g. "C.T. 3". All references to the hearing on the Extraordinary Motion for New Trial held on July 7, 1981, will be preceded by the capital letters "HT" followed by the page reference, e.g. "HT. 4".

All references to the record in the Georgia Supreme Court will be preceded by the capital letter "R" followed by the page reference, e.g. "R:4". All references to the appendices will be preceded by the capital letter of the particular appendix followed by the page reference, e.g. A-5.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

I. Whether the Georgia Rule prohibiting the granting of a new trial on the basis that a witness has recanted his trial testimony denies Petitioner fundamental fairness and due process of law where Petitioner's convictions could not stand without the trial testimony of the witness who has now recanted that testimony, admitted that it was perjured and exculpated the defendant. . . . i

II. Whether the imposition of the death penalty on a defendant would constitute cruel and unusual punishment in violation of the Eighth Amendment where the sufficiency of the conviction upon which that penalty was based rests squarely on the testimony of a witness who has now recanted that testimony, admitting that it was perjured, and has exculpated the defendant of the crimes, and where the state has invoked a rule barring a new trial on the basis of the witness' recanting of his trial testimony... i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

FACTS 3

HOW THE FEDERAL QUESTION WAS RAISED BELOW 3

REASONS FOR GRANTING THE WRIT 6

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A STATE RULE BARRING A NEW TRIAL ON THE BASIS THAT A WITNESS HAS RECANTED HIS TRIAL TESTIMONY VIOLATES STANDARDS OF FUNDAMENTAL FAIRNESS AND DUE PROCESS EMBODIED IN THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN IT OPERATES TO DENY A NEW TRIAL TO A DEFENDANT WHO RECEIVED THE DEATH PENALTY FOR MURDER AND A LIFE SENTENCE FOR ARMED ROBBERY WHERE THE SOLE WITNESS TO IMPLICATE THAT DEFENDANT IN THE MURDER AND ROBBERY, AND WITHOUT WHOSE TESTIMONY THE CONVICTIONS OF THE DEFENDANT COULD NOT STAND, HAS NOW RECANTED THAT TESTIMONY, ADMITTING THAT IT WAS PERJURED, AND HAS EXCULPATED THE DEFENDANT. 6

CONCLUSION 11

CERTIFICATE OF SERVICE 12

APPENDICES

TABLE OF AUTHORITIES

CASES: Page No.

Bell v. State, 227 Ga. 800, 183 S.E.2d 357 (1971) 6

Drake v. State, 241 Ga. 583, 247 S.E.2d 57 (1978) 3,8

Drake v. Zant, Sup. Ct. #79-6615 (decided November, 17, 1980) 3

Felton v. State, 187 Ga. 84 (1976) 7

Fowler v. State, 187 Ga. 406, 1 S.E.2d 18 (1939) 6

Gardner v. Florida, 430 U.S. 349 (1977) 10

Richey v. State, 132 Ga.App. 188, 207 S.E.2d 672 (1974) 7

Stroud v. State, 247 Ga. 395, 276 S.E.2d 597 (1981) 6

Sutton v. State, 238 Ga. 336, 232 S.E.2d 569 (1977) 6

Timberlake v. State, 246 Ga. 488, 271 S.E.2d 357 (1971) 6

CONSTITUTIONAL PROVISIONS:

Eight Amendment 2,5,6,7,9

Fourteenth Amendment 2,5,6,7,9

STATUTES:

28 U.S.C. §1257(3) 2

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HENRY ARTHUR DRAKE,

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Vs.

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

The Petitioner, HENRY ARTHUR DRAKE, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia affirming the denial of his Extraordinary Motion for New Trial on charges of murder and armed robbery.

OPINIONS BELOW

On July 24, 1981, the Superior Court of Butts County, Georgia entered an order (copy attached as Appendix A) denying Petitioner's Extraordinary Motion for New Trial on charges of murder and armed robbery for which Petitioner is currently facing sentences of death and life imprisonment, respectively. On February 9, 1982, the Supreme Court issued an opinion affirming the trial court's order (copy attached as Appendix B). It is from this decision that Petitioner now appeals.

JURISDICTION

Jurisdiction of this appeal is grounded on the July 24, 1981 order of the Superior Court of Butts County denying Petitioner's Extraordinary Motion for New Trial and on the February 9, 1982 decision of the Georgia Supreme Court affirming that trial court order.

The jurisdiction of the Supreme Court is invoked pursuant to this court's ability to review and decide any title, right, privilege or immunity, specifically set up or claimed under the Constitution of the United States. 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves the Eighth Amendment and the first section of the Fourteenth Amendment to the Constitution of the United States which provide as follows:

Amendment VIII:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV (Section 1):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The case involves Article 1, Section 1, Paragraph 1 of the Constitution of Georgia of 1976 which provides as follows:

Art. I, Sec. I, Paragraph I: (Ga. Code Ann. §2-101)

> No person shall be deprived of life, liberty, or property, except by due process of law.

STATEMENT OF THE CASE

Facts and How the Federal Questions Were Raised Below (For the sake of clarity and brevity and to avoid undue repetition, these two sections have been combined):

On September 1, 1977, Petitioner was convicted of the murder and armed robbery of a Colbert, Georgia barber and was sentenced to death and life imprisonment, respectively, for those crimes. His convictions were affirmed on direct appeal by the Georgia Supreme Court. Drake v. State, 241 Ga. 583 (247 SE2d 57)(1978), cert. denied, 440 U.S. 928, 99 S.Ct. 1265, 59 L.Ed.2d 485 (1979).

Subsequently, a State Petition for Writ of Habeas Corpus was filed but denied at the lower court level. The Georgia Supreme Court denied Petitioner's Application for a Certificate of Probable Cause, and this Court denied certiorari over the dissent of Justices Brennan, Marshall, Stewart and White. Drake v. Zant, S.Ct. #79-6615, decided November 17, 1980.

The key prosecution witness against the Petitioner at trial was William Campbell, a co-defendant who had been separately tried and convicted for the same crimes almost a year before Petitioner's trial. Campbell's testimony at both his own trial and that of Petitioner was that Petitioner committed the crimes and that Campbell witnessed the crimes as an innocent bystander. Campbell was the only witness to implicate Petitioner in the crimes while there were eye-witnesses who placed Campbell at the scene. Petitioner maintained his innocence throughout the proceedings, taking the stand in his own defense and denying Campbell's allegations.

On April 2, 1981, Campbell executed a sworn affidavit (attached hereto as Appendix C and to Appellant's Extraordinary Motion for New Trial as Exhibit A, R: 18-19) admitting that he lied when he testified that Henry Drake committed the crimes against the barber and further admitting that he alone and not

Drake, was responsible for the death and robbery of the barber. On the basis of this affidavit an Extraordinary Motion for New Trial was filed on Petitioner's behalf. (R:14-25).

A hearing on said motion was scheduled for July 7, 1981, at the Elbert County courthouse. Petitioner filed a timely motion to be present at this hearing (R:42-43); however, said motion was denied (R:46), and the hearing was held without the Petitioner's presence over the objection of Petitioner's counsel (HT:3-4).

At the hearing Campbell reiterated what he had said in his affidavit. His testimony was that he lied at both his own trial and Petitioner's trial when he testified that Petitioner beat and robbed the barber and furthermore, that it was he alone, and not Drake, who committed the crimes. (HT:9, 12-16, 22, 26-35, 43-44, 47, 52, 60-61). He explained that he lied and blamed the crimes on Drake because he was mad at the Petitioner. (HT:22). He testified that at first he was mad because he thought Petitioner had informed the authorities where he could be located. He believed this because when the Georgia authorities came to Virginia to pick him up they had the watch which Campbell had taken from the barber and had given to Petitioner before leaving Georgia (HT:23-24). He also believed that Petitioner had turned him in because the police were waiting for him at the bus station in Norton, Virginia and the Petitioner was the only one who knew where he was going. (HT:25-26). He remained angry at Petitioner because Drake treated him ugly when the authorities brought him back for trial telling Campbell he hoped he would 'get the chair' before his trial and that he and his family were glad Campbell 'got the chair' after Campbell had been convicted and sentenced to death. (HT:27-29). Campbell testified that he wanted to pay Petitioner back for the way he treated him (HT:27-29).

Despite Campbell's testimony that he had lied at Petitioner's trial and that the Petitioner did not commit the crimes of which he was convicted, which testimony was unrefuted by any evidence from the state, and despite Petitioner's contentions that to deny him a new trial under the facts of this case would be a violation of his rights under the Constitution of the United States, the trial court entered an order denying the Petitioner's motion for a new trial. (R:78). (See Appendix A hereto).

Petitioner appealed the trial court's ruling once again urging that the denial of a new trial in his case would violate the fundamental rights guaranteed him by the Eighth and Fourteenth Amendments to the United States Constitution. (p.30-31, Brief of Appellant, R:84-85). However, the Supreme Court issued an opinion affirming the trial court's denial of the Extraordinary Motion for New Trial on February 9, 1982. (See Appendix B hereto).

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A STATE RULE BARRING A NEW TRIAL ON THE BASIS THAT A WITNESS HAS RECANTED HIS TRIAL TESTIMONY VIOLATES STANDARDS OF FUNDAMENTAL FAIRNESS AND DUE PROCESS EMBODIED IN THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN IT OPERATES TO DENY A NEW TRIAL TO A DEFENDANT WHO RECEIVED THE DEATH PENALTY FOR MURDER AND A LIFE SENTENCE FOR ARMED ROBBERY WHERE THE SOLE WITNESS TO IMPLICATE THAT DEFENDANT IN THE MURDER AND ROBBERY, AND WITHOUT WHOSE TESTIMONY THE CONVICTIONS OF THE DEFENDANT COULD NOT STAND, HAS NOW RECANTED THAT TESTIMONY, ADMITTING THAT IT WAS PERJURED, AND HAS EXCULPATED THE DEFENDANT.

Under Georgia law new trials on the basis of newly discovered evidence are mandated if the newly discovered evidence meets the following six criteria: (1) that the evidence has come to the knowledge of the Petitioner since trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that the only effect of the evidence will not be to merely impeach the credit of a witness. However, if any of the requirements are not met then a new trial will not be granted. Bell v. State, 227 Ga. 800, 805 (183 S.E.2d 357)(1971), Timberlake v. State, 246 Ga. 488, 491 (271 S.E.2d 792)(1980) and see Drake v. State, (attached hereto as Appendix B).

The Georgia Supreme Court upheld the denial of a new trial in Petitioner's case, opining that "Pretermitting the question of whether the 'newly discovered evidence' meets the first five of the above requirements, it is clear that the effect of Campbell's new testimony is to impeach the credibility of his earlier sworn statements. The law is settled that a post-trial declaration by a State's witness that his former testimony was false is not a ground for a new trial. Stroud v. State, 247 Ga. 395 (276 SE2d 597)(1981); Sutton v. State, 238 Ga. 336, 338 (232 SE2d 569)(1977); Fowler v. State, 187 Ga. 406 (1 SE2d 18)(1939);

Felton v. State, 56 Ga. 84 (1876); Richey v. State, 132 Ga. App. 188 (207 SE2d 672)(1974); Code Ann. §70-204."

Initially Petitioner would assert that contrary to the Georgia Supreme Court's ruling his Extraordinary Motion for New Trial met each of the requirements above, including the sixth requirement. However, it is the Petitioner's contention that the denial of the Extraordinary Motion for New Trial in his case on the basis stated by the Georgia Supreme Court is a violation of the rights guaranteed to all citizens by the Eighth and Fourteenth Amendments to the United States Constitution.

The most obvious problem with the Court's ruling is that a witness' recantation of his trial testimony will always have the effect of impeaching the "credibility of his earlier sworn statements". Moreover, to hold that a post-trial declaration by a State's witness that his former testimony was false can never be a ground for a new trial is not only an erroneous interpretation of prior Georgia law but, more importantly, it completely prevents a convicted defendant in Petitioner's shoes, no matter how innocent he may in fact be, from contesting his guilt or from establishing that his conviction was based on perjured testimony by way of newly discovered evidence.

Petitioner's case poses a rare situation in which the only witness to implicate the Petitioner in the crimes has now admitted, under oath, that Petitioner was not the perpetrator. It is the Petitioner's misfortune that this witness was not only the sole witness to testify as to Petitioner's alleged commission of the crimes, but he was also the only person present when the crimes were allegedly committed.

Let us assume for a moment that Petitioner is in fact innocent and that, as Petitioner has always maintained, and as Campbell now testifies, Petitioner let Campbell out to get a haircut with no knowledge or intention that Campbell do anything but get his hair cut; that Campbell alone, for whatever reason,

fought with and robbed the barber; that Petitioner and his girlfriend Mary Carruth picked Campbell up from across the street at the laudromat on their way back from Petitioner's mother's; that upon returning to Madison Campbell told them that he had fought with and hurt the barber; that Campbell believed that Petitioner had turned him in and therefore tried to lay the crime upon Petitioner by first lying to the police and then to the juries in his and Petitioner's trials. Assuming these facts, where there are no other eye-witnesses to the crime, Petitioner has no way of proving that Campbell lied when he testified at Petitioner's trial that Petitioner was the assailant except by Campbell's own admission that his testimony was perjured and that Drake is, in fact, innocent.

Yet, the Georgia Supreme Court's ruling denying Petitioner a new trial forecloses to Petitioner any forum in which to present the newly obtained evidence indicating that he is innocent of the crimes for which he has been imprisoned and now faces a sentence of death, as well as any forum in which to demonstrate that his convictions for those crimes were based upon perjured testimony.

As the Supreme Court itself noted in its opinion denying Petitioner's Motion for New Trial when it quoted from its opinion affirming Petitioner's convictions on direct appeal, the "State's case rested largely on Campbell's testimony, since there was no other direct evidence, and little circumstantial evidence of Drake's participation in the crime". (Georgia Supreme Court Order attached hereto as Appendix B at page 3 quoting from Drake v. State, 241 Ga. 583 at 584. (247 SE2d 57)(1978).) Indeed, not only did the facts of the case not strongly point to Petitioner's guilt but the Petitioner and three alibi witnesses testified that Petitioner was not even at the scene of the crime at the time that the crimes took place.

The new evidence presented by Petitioner's Extraordinary Motion for New Trial (Campbell's affidavit and testimony recanting his original testimony) gives every indication not only that Petitioner is in fact innocent, but also that the only witness to implicate Petitioner in the crimes committed perjury in doing so. Petitioner's case is not one in which the recanting witness' original testimony could be considered disinterested and facially credible. Instead, Campbell's original testimony arose from powerful motives of self-protection and revenge. Furthermore, Campbell had a long history of criminal conduct at the time of his trial testimony. Given the state of the record and the nature of the new evidence presented by Petitioner's motion in addition to the fact that the jury which convicted him took over six hours to do so, a new jury given the benefit of the new evidence might well decide that there is a reasonable doubt as to the Petitioner's guilt.

Nevertheless, the Georgia Supreme Court would send Petitioner, against whom the Court itself admits that the sufficiency of the evidence at trial was marginal, to the electric chair without even allowing him to place this evidence before a jury.

To deny Petitioner's a new trial under these circumstances is to deny him the due process of law upon which justice in this country is based. Moreover, the imposition of the death penalty in this case without having given Petitioner the opportunity to defend his life before a jury who had been apprised of Campbell's recantation and exoneration of Petitioner would constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution and would result in an act of manifest injustice and inhumanity.

In death penalty cases the interest in reliability of the guilt/innocence determination and in procedural fairness is far

more acute because, as this Court has recognized, death is different both in its severity and finality. Though written in the context of a presentence report considered at the punishment phase the following words of Mr. Justice Stevens in Gardner v. Florida, supra, are equally applicable under the circumstances of this case:

> "[I]f the disputed matter is of critical importance, the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death."

Petitioner only asked of the Georgia Courts that he be given the time and opportunity to present in newly discovered evidence of his innocence to a jury which can then determine his guilt or innocence in light of that new evidence. However, the Georgia Courts ruled that under Georgia law a post-trial declaration by a State's witness that his former testimony was false is not a ground for a new trial, thus procedurally foreclosing Petitioner from seeking to establish that he is innocent and that his convictions were based on perjured testimony.

The evidence upon which Petitioner was convicted was of questionable sufficiency to begin with, and the witness who supplied the sole evidence implicating Petitioner with the crimes has now given sworn testimony that that evidence was false. It is Petitioner's contention that not only would time most certainly be well spent and procedural fairness and civilized justice well-served by a new trial being provided and a new jury empanelled to redetermine Petitioner's guilt or innocence in light of the new evidence of his innocence, but that due process and the prohibition against cruel and unusual punishment require such a new trial.

This Court upheld Georgia's death penalty statute only on the basis that convictions upon which the death penalty was given as the punishment would be carefully reviewed so as to insure

that constitutional rights were scrupulously honored to eliminate as much as possible the chance that an innocent person might suffer the irreversible consequences of the imposition of that sentence. All that Petitioner seeks is an opportunity to present to a jury what could well be evidence sufficient to persuade that jury that Petitioner is not guilty.

The denial of Petitioner's Extraordinary Motion for New Trial illustrates that the Georgia Supreme Court has abandoned its duty to conduct a careful and conscientious review of this death penalty case in the spirit approved by this Court and has instead conducted a mere "rubber stamp" review of the lower court's ruling. Therefore, the death penalty as applied in this case is unconstitutional. This Court should accept certiorari to determine if Petitioner's contentions are correct.

CONCLUSION

For all the foregoing reasons Petitioner asks that the Court grant a Writ of Certiorari and undertake to determine the significant and important issues raised in his Petition.

Respectfully submitted,

MARTIN & YOUNG, P.C.

By: John R. Martin by MJW
JOHN R. MARTIN

By: Mary J. Wilkes
MARY J. WILKES

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JUL 27 Recd

IN THE SUPERIOR COURT FOR THE COUNTY OF MADISON

STATE OF GEORGIA

STATE OF GEORGIA	)	CRIMINAL ACTION NO. 5972G
	)	
	)	
VS	)	MURDER--ARMED ROBBERY
	)	
	)	
HENRY ARTHUR DRAKE	)	EXTRAORDINARY MOTION FOR NEW TRIAL
	)	

O R D E R

Defendant having filed an Extraordinary Motion for New Trial, and same having come on for a hearing before this Court on July 7, 1981, and the Court having heard and considered all the evidence presented, and the parties having filed briefs, and the Court having studied same, and the Court having heard from counsel orally at said hearing, and the Court having studied and reviewed the trial transcript in full, this Court finds that there is no valid legal reason that requies a new trial in said case and, therefore, the Extraordinary Motion for New Trial made by the Defendant must be denied.

NOW, THEREFORE, said Extraordinary Motion for New Trial is hereby denied. The Court further denies the State's Motion to Strike certain material in said Extraordinary Motion for New Trial.

SO ORDERED.

This 24th day of July, 1981.

William F. Grant

WILLIAM F. GRANT
Judge, Superior Courts
Northern Judicial Circuit

APPENDIX A

FEB 1 1 RECD

In the Supreme Court of Georgia

Decided: FEB 9 1982

38034, 38272. HENRY ARTHUR DRAKE v. THE STATE

GREGORY, Justice.

In case No. 38034 Henry Arthur Drake appeals from the denial of his extraordinary motion for new trial based on newly discovered evidence.

Drake was convicted of the armed robbery and murder of a Madison County barber. He was sentenced to death for the murder and life imprisonment for the armed robbery. We affirmed his convictions on appeal. Drake v. State, 241 Ga. 583 (247 SE2d 57) (1978), cert. denied, 440 U. S. 920 (99 SC 1265, 59 LE2d 485) (1979).

Prior to Drake's trial, his co-indictee, William Campbell, was tried and convicted of the armed robbery and murder. Campbell was sentenced to life imprisonment for the armed robbery and death for the murder. Campbell's convictions were affirmed on appeal. See, Campbell v. State, 240 Ga. 352 (240 SE2d 828) (1977), cert. denied, 439 U. S. 882 (SC , LE2d) ( ). At Campbell's trial, Campbell testified that he and Drake had been drinking prior to going to the victim's barber shop. Campbell maintained that over his protests, Drake had bludgeoned the barber with a claw hammer, then robbed him.

Campbell testified that, after striking the barber, Drake hit Campbell in the head with the hammer, then picked him up and placed him next to the door. Campbell testified

that when Drake helped him up to leave, he noticed blood on the floor. The State introduced into evidence a small knife found at the scene of the crime which matched the description of a knife belonging to Drake. Campbell testified that he had never seen this knife before. The State presented evidence that there had been a struggle in the barber shop of a "violent and brutal nature." Campbell, supra, at 352. "Blood [was] smeared all over the whole barber shop and everything in the barber shop." Campbell, at 353. The State also showed that, at the time of Campbell's arrest in Virginia, he was wearing the band to a watch which had belonged to the victim. The victim's watch was found at the residence Campbell and Drake shared. Drake did not testify at Campbell's trial.

At Drake's trial Campbell testified that, over his protests, Drake "struggle[d] with the victim until [the barber] passed out from blows to his head." Drake, supra, at 584. The State also showed that "the victim was over 70 years old, but he was healthy...Campbell was in his sixties, and suffered so severely from asthma and emphysema that he could not exert himself strenuously. Drake, on the other hand, was healthy and in his thirties. From this the State argued that Drake must have been the one who actually beat the victim." Ibid.

Drake maintained his innocence at trial. He testified that he was visiting his mother at the time of the offense. Drake's alibi was corroborated by Mary Caruth with whom Drake and Campbell lived. Drake's mother also testified that her son was with her at the time of the crime. There was undisputed evidence that Caruth and Drake drove Campbell

to the barber shop, drove him to their home later in the afternoon, and then drove him to Atlanta so that "he could flee the state even though by that time Drake admittedly knew of Campbell's involvement in the crimes." Drake, supra, at 586.

We noted, in reviewing Drake's convictions, that the "State's case rested largely on Campbell's testimony, since there was no other direct evidence, and little circumstantial evidence of Drake's participation in the crime." Id. at 584.

In April, 1981, Campbell signed an affidavit stating that he lied at Drake's trial and that Campbell, not Drake, had been responsible for the murder of the barber. The affidavit alleges that Drake and Caruth dropped Campbell off at the barber shop, then drove away. Campbell states that the barber "messed [his] hair up;" that he tried to get the barber to "fix it," but the barber refused, that the barber "got mad and hit [Campbell] with a hammer," whereupon Campbell drew a small knife belonging to Drake, took the hammer away, then beat and robbed him. The affidavit states that, afterwards, Campbell waited for Drake and Caruth to pick him up. He informed them that he was in trouble and gave Drake the victim's watch. Drake later took Campbell to Atlanta where Campbell boarded a bus to Virginia.

Campbell's affidavit asserts that he implicated Drake in the crimes because he believed Drake had informed the authorities that he could be located in Virginia. The officer who arrested Campbell in Virginia had the victim's watch in his possession. Campbell states that since he had earlier given this watch to Drake, he had reason to believe

Drake led the authorities to him. Campbell's affidavit states that he testified against Drake at Drake's trial because Drake had told him after Campbell's conviction that he was glad Campbell "got the chair," and that he is recanting his earlier testimony because he 'know[s] it was wrong to lie" and he desires "to be forgiven."

At the hearing on the extraordinary motion for new trial Campbell testified that the barber struck the first blow and that he beat the barber in self-defense. Campbell explained that he had taken Drake's knife from him before going to the barber shop. When the barber attacked him, Campbell stabbed him "once or twice" with the knife, but found it "didn't do no good." He threw it on the floor of the barber shop where it was later found by the police. Campbell further testified that, while his health was so poor he could "hardly walk a block without giving out," he and the barber "scuffled all the way to the back" of the barber shop. He also testified that there was "not a lot of blood" in the shop when he left, and that the barber, while conscious, was unable to move.

Drake's attorney introduced into evidence an affidavit from another attorney who had represented Drake at his habeas corpus hearing, stating that in "May or June, 1979" Campbell had informed him that Campbell had committed the crime and that Drake was not involved. On cross-examination Campbell denied knowing the other attorney or ever making this statement to him.

(1) "The standard for granting a new trial on the basis of newly discovered evidence is well established. 'It is incumbent on a party who asks for a new trial on the

ground of newly discovered evidence to satisfy the court: (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.' Emmett v. State, 232 Ga. 110, 117 (205 SE2d 231) (1974); Bell v. State, 227 Ga. 800, 805 (183 SE2d 357) (1971); Burge v. State, 133 Ga. 431, 432 (66 SE 243) (1909); Berry v. State, 10 Ga. 511, 527 (1851); see Code Ann. § 70-204. All six requirements must be complied with to secure a new trial. Offutt v. State, 238 Ga. 454, 455 (233 SE2d 191) (1977); Corn v. State, 142 Ga. App. 798, 799 (237 SE2d 203 (1977)." Timberlake v. State, 246 Ga. 488, 491 (271 SE2d 792) (1980).

Pretermitting the question of whether the "newly discovered evidence" meets the first five of the above requirements, it is clear that the effect of Campbell's new testimony is to impeach the credibility of his earlier sworn statements. The law is settled that a post-trial declaration by a State's witness that his former testimony was false is not a ground for a new trial. Stroud v. State, 247 Ga. 395 (276 SE2d 597) (1981); Sutton v. State, 238 Ga. 336, 338 (232 SE2d 569) (1977); Fowler v. State, 187 Ga. 406 (1 SE2d 18) (1939); Felton v. State, 56 Ga. 84 (1876); Richey v. State, 132 Ga. App. 188 (207 SE2d 672) (1974); Code Ann. §70-204.

Further, inconsistencies between the testimony Campbell now offers and other evidence presented on the trial of the case cast serious doubt on the credibility of his latest testimony. Campbell's testimony at the hearing on the extraordinary motion for new trial that he was the sole perpetrator of the crime contradicts his trial testimony that, at the time of the crime, his health was so impaired he was incapable of strenuous physical exertion. Campbell's current testimony that there was "not much blood" in the barber shop when he left the victim conflicts with evidence introduced at trial showing that "blood was smeared all over" the barber shop.

"All applications for new trial upon the ground of newly discovered evidence are addressed to the sound discretion of the trial judge, and unless it affirmatively appears that he has abused his discretion in overruling the same, his discretion will not be controlled." Kitchens v. The State, 228 Ga. 624, 626 (187 SE2d 268) (1972); Carter v. State, 246 Ga. 328 (271 SE2d 475) (1980); Pullin v. State, 237 Ga. 759 (229 SE2d 606) (1976). We conclude that the trial court did not abuse its discretion in denying Drake's extraordinary motion for new trial.

(2) Drake's contention that the trial court erred in denying his motion to be present at the hearing on the extraordinary motion for new trial is, likewise, without merit. "In Georgia, as in most jurisdictions, the general right of one accused of a felony to be present during the course of his trial does not extend to post-verdict pro-

cedures such as a motion for new trial, at which only questions of law, not questions of fact are determined." Dobbs v. The State, 245 Ga. 208 (264 SE2d 18) (1980). Contrary to Drake's position, the trial court did not abuse its discretion in denying this motion.

(3) Following the trial court's denial of the extraordinary motion for new trial, the State made a motion to delete from the record on appeal a brief and memorandum of law submitted by Drake in favor of the extraordinary motion for new trial, Campbell's affidavit recanting his trial testimony and a letter written by Drake's attorney to the district attorney of the Northern Judicial Circuit. At the hearing on the motion to correct the record, the State took the position that, since none of these documents had been offered in evidence at the hearing on the extraordinary motion for new trial, they were not properly a part of the record on appeal. The trial court agreed and ordered the documents deleted from the record. In case No. 38272 Drake appeals from that decision.

We find that, even if the trial court committed error in deleting these documents from the record, Drake has not shown how he was harmed by this error. We have studied the excluded brief and memorandum of law and find that they contain essentially the same arguments made in Drake's brief to this court in case No. 38034. A copy of Campbell's affidavit, attached to Drake's extraordinary motion for new trial, was properly made a part of the record transmitted to this court in case No. 38034; Drake cannot complain that he was harmed by the trial court's exclusion of an additional copy. Nor can we agree with Drake's contention that he was harmed by the exclusion of a letter to the district

attorney outlining Drake's intention to file an extraordinary motion for new trial.

Last, Drake argues that the trial court erred in denying his oral motion to have a letter to the district attorney included in the record in case No. 38034. This letter, which we now have before us, purports to confirm a phone conversation in which the district attorney stated he would not seek an indictment against William Campbell for perjury. Drake contends that this letter indicates a lack of good faith on the part of the State because the State is arguing that Drake's extraordinary motion for new trial should be denied since Campbell has not been convicted of perjury, while refusing to seek an indictment against Campbell for this offense. As this argument by the State is not relevant to our determination that the trial court did not err in denying the extraordinary motion for new trial, we find no harmful error in excluding this letter from the record.

Judgment affirmed in cases 38034 and 38272. All the Justices concur, except Hill, P. J., and Clarke, J., concur in the judgment only and Weltner, J., concurs specially.

Please substitute this page for the one previously sent to you

FEB 17 Recd

38034, 38272. HENRY ARTHUR DRAKE V. THE STATE

WELTNER, Justice, concurring specially.

The only principles necessary to resolve the issues presented by this case are those set out in the First Division of the opinion, specifically, "a new trial will not be granted if the only effect of the evidence will be to impeach the credit of the witness" and "a post-trial declaration by a State's witness that his former testimony was false is not ground for a new trial."

As Drake's contentions clearly fall within one or both of these principles, the Second and Third Divisions of the majority opinion should fall to the venerable but valid precept known as "Occam's Razor" [essentia non sunt multiplicanda praeter necessitatem], standing for the proposition that matters must not be multiplied beyond necessity.

I am authorized to state that Mr. Justice Smith joins in this concurrence.

38034, 38272. HENRY ARTHUR DRAKE v. THE STATE.

HILL, Presiding Justice, concurring specially.

I write to explain my inability to agree with either the majority opinion or the concurring opinion.

First, to put this case in perspective, it should be noted that here the trial judge heard the extraordinary motion for new trial on its merits. Thus, the pleading requirements of Dick v. State, ____Ga.____ (38103, decided Feb. 9, 1982), are not involved here.

Second, after hearing Campbell's testimony offered in support of the extraordinary motion, the trial judge denied the motion. The majority opinion points out that there is serious doubt as to the credibility of Campbell's testimony at the hearing. The majority opinion then proceeds to find that the trial judge did not abuse his discretion in overruling the extraordinary motion. I agree with the majority opinion in so finding.

The specially concurring opinion contends that the majority should not have reached the questions of credibility and discretion but should have concluded when it found that "'a new trial will not be granted if the only effect of the evidence will be to impeach the credit of the witness' and 'a post-trial declaration by a State's witness that his former testimony was false is not ground for a new trial.'" With this contention in the specially concurring opinion I cannot agree, and its inclusion in the majority opinion causes me to be unable to adopt that opinion.

It is correct that "a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness" (emphasis supplied), such as a "newly discovered" witness who says "I wouldn't believe the

state's witness under oath." However, when the state's eyewitness recants his trial testimony, the effect is not "only" to impeach his credibility; it casts doubt on the proof used to convict and the correctness of the guilty verdict. Therefore, in my view (and from the majority's reliance on Campbell's credibility and the trial judge's discretion, I assume in their view) the trial judge was correct in conducting the hearing so as to hear Campbell's testimony, rather than refusing to hear the matter on the ground that "a post-trial declaration by a State's witness that his former testimony was false is not ground for a new trial."

This statement as to post-trial declarations of the state's witnesses is necessarily wrong. Assume that in a trial for rape the victim testified that the defendant entered her home, threw her on the bed, raped her, and fled as her husband returned home. The husband testified he saw the defendant fleeing from the house as he arrived. The defendant claimed consent but the jury found him guilty. After conviction and appeal, the state's key witness (the victim) says under oath that she was not raped, that she had been having an affair with the defendant, that the defendant fled when they heard her husband approaching, and that she concocted the rape story to cover up the affair she was having with the defendant. Would a court hold that "a post-trial declaration by a state's witness that her former testimony was false is not ground for a new trial"? Would a court hold that a trial judge who granted an extraordinary motion for new trial in such a case was without authority to do so? I doubt it.

In the case before us, I agree that it has not been shown that the trial judge, after hearing Campbell's testimony, abused his discretion in denying the extraordinary motion for new trial. I therefore concur in the judgment.

COUNTY OF BUTTS
STATE OF GEORGIA

A F F I D A V I T

Personally appeared before me, the undersigned officer duly authorized by law to administer oaths in the State of Georgia, WILLIAM CAMPBELL, who, after first being duly sworn, deposes and states as follows:

My name is William Campbell and I was a witness in the trial of Henry Arthur Drake for armed robbery and murder. I lied at this trial. I said Henry was the one who killed the barber, Mr. Eberhart, and that I tried to stop Henry from killing him. But what I said were lies. I was the one who killed Mr. Eberhart. Henry wasn't even there. He didn't have anything to do with it.

He and Henry were going to Colbert. Henry was going to see his mamma and he dropped me off at the barber shop and was going to pick me up on his way back to Madison. I went to the barber shop and Mr. Eberhart cut my hair, but he messed my hair up. I tried to get him to fix it but he wouldn't. He got mad and hit me with a hammer. I pulled my knife to try to get the hammer from him. I stabbed him but the blade broke off. I got the hammer away and beat him up. I saw his watch and took it and took about $400.00 out of his pocket, too.

I left the barber shop and waited behind a laundromat until I saw Henry come back. I got in the truck. (I noticed Henry's girl friend had a bowl of Henry's mamma's soup on her lap.) I told Henry about the fight and I told him I thought I might have killed the barber. Henry had to go back to his mamma's for a few minutes. He came back out with a coat or something. Then we went back to Madison.

During the night Henry went back to Colbert to see how the man was doing. In the morning he told me Mr. Eberhart was doing real bad and I'd better leave. I asked Henry to take me to Atlanta. I gave Henry Mr. Eberhart's watch. Henry took me to Atlanta and I stayed there a few days and then took the bus to my hometown, Norton, Virginia. While I was there I robbed a pawn shop and was arrested and got twenty years for armed robbery.

While I was in jail in Virginia an officer from Georgia came to question me about the barber's murder. I figured Henry must have turned me in--told everything and where I was because the officer had the watch that I'd given Henry. I told the officer I didn't kill Mr. Eberhart. I said Henry did it and I said I tried to stop Henry. I didn't do nothing but lie. I lied about Henry because I thought Henry had done me dirty. I thought Henry had turned me in and the way Henry treated me when I came back to Georgia made me keep on lying. Henry was ugly to me at the jail and after my trial, Henry said he and his whole family were glad I got the chair.

But since being here at Jackson I've thought it over and I know it was wrong to lie and I can't go on living like this. I've changed my way of living now. I'm living better and doing right now. I know what I'm saying might hurt my own appeals but I'm not going to worry about it. I don't want to go on lying. I want to get this off my conscience and try to be forgiven by Henry and God Almighty.

I'm willing to go to court to say that I lied in Henry's trial. Also this affidavit may be used in any way that will help change the wrong that I've done.

William B Campbell
WILLIAM CAMPBELL

Sworn to and subscribed before me
this the 29 day of April, 1981

Linda Hunt
Notary Public, Georgia State
at Large. My commission expires
Aug 20, 1984.

FEB 12

38034, 38272. HENRY ARTHUR DRAKE v. THE STATE

Please substitute page 6 in the opinion.
Last word on third line changed from "recanted"
to "latest".

39034, 38272

FEB 16 RECD

SUPREME COURT OF GEORGIA

ATLANTA, February 12, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Henry Arthur Drake v. The State

It is ordered that this Court's judgment of February 9, 1982, be hereby amended to show Clarke, J., concurs in the judgment only.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Hallford, Deputy Clerk.

Exhibit B

38034, 38272

SUPREME COURT OF GEORGIA

ATLANTA, February 16, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Henry Arthur Drake v. The State

It is ordered that this Court's judgment of February 9, 1982, be hereby amended to show Hill, P. J., concurring specially.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Hafford, Deputy Clerk.

Exhibit C

RECEIVED
APR 15 1982
OFFICE OF THE CLERK
SUPREME COURT U.S.

NO. 81 6540

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

HENRY ARTHUR DRAKE,

Petitioner,

Vs.

STATE OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

The Petitioner, HENRY ARTHUR DRAKE, who is now confined in the Georgia Diagnostic and Classification Center in Jackson, Georgia, under a sentence of death, asks leave to file the attached Petition for Writ of Certiorari to the United States Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53 of this Court.

The Petitioner's Affidavit in support of this motion is attached hereto.

Respectfully submitted,

MARTIN & YOUNG, P.C.

By: John R. Martin
JOHN R. MARTIN

By: Mary J. Wilkes
MARY J. WILKES

ATTORNEYS FOR PETITIONER

504 Grant Building
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RECEIVED
APR 15 1982
OFFICE OF THE CLERK
SUPREME COURT U.S.

NO. 81 6540

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

HENRY ARTHUR DRAKE,

Petitioner,

Vs.

STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF GEORGIA

COUNTY OF BUTTS

I, HENRY ARTHUR DRAKE, Petitioner, hereby state under oath the following:

1. I am a citizen of the United States of America and the Petitioner in the above-entitled action.

2. I desire to seek a review, pursuant to 28 U.S.C. §1257(3), of the judgment entered by the Supreme Court of Georgia on February 12, 1982, affirming the denial of an Extraordinary Motion for New Trial in my case by the Superior Court of Butts County, Georgia, but because of my poverty, I am unable to pay the costs of such a review or to provide security.

3. I believe I am entitled to the redress I seek by such a review, and that such a review presents substantial issues of deprivation of rights secured by the Constitution of the United States.

The nature of the questions to be presented upon such a review are set out in the accompanying Petition for Writ of Certiorari.

I contend that the Supreme Court of Georgia erred in affirming the denial of my Extraordinary Motion for New Trial.

WHEREFORE, Petitioner respectfully prays that he may have leave to proceed in this Court on Petition for Writ of Certiorari in forma pauperis.

FURTHER AFFIANT SAYETH NOT.

Henry A Drake.
HENRY ARTHUR DRAKE

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 5th DAY OF APRIL, 1982.

Mary N Wilkes
NOTARY PUBLIC
Notary Public, Georgia, State at Large
My Commission Expires June 1, 1985

ORIGINAL

NO. 81-6540

RECEIVED
MAY 17 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

HENRY ARTHUR DRAKE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY THE ATTORNEY GENERAL

SUSAN V. BOLEYN
Assistant Attorney General
Counsel of Record

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

SUSAN V. BOLEYN
132 State Judicial Bldg.
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(404)656-3397

QUESTIONS PRESENTED

1.

Whether this Court should consider Petitioner's allegations that his constitutional rights under the Eighth and Fourteenth Amendments to fundamental fairness and due process were violated by the denial of his extraordinary motion for new trial, when the federal questions were not presented to the state courts for consideration.

2.

Whether the Supreme Court of Georgia properly upheld the trial court's denial of Petitioner's extraordinary motion for new trial based on an independent and adequate state ground.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED. i

STATEMENT OF THE CASE. 1

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD REFUSE TO CONSIDER THE ISSUES RAISED BY THE PRESENT PETITION, AS NONE OF THE FEDERAL QUESTIONS RAISED WERE PROPERLY PRESENTED TO THE STATE COURTS FOR A DECISION. 3

II. THE SUPREME COURT OF GEORGIA PROPERLY UPHELD THE DENIAL OF PETITIONER'S EXTRAORDINARY MOTION FOR NEW TRIAL BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND. 7

CONCLUSION. 9

CERTIFICATE OF SERVICE. 10

TABLE OF AUTHORITIES

Cases Cited:

Bell v. State, 227 Ga. 800, 183 S.E.2d 357 (1971). 4, 7

Burge v. State, 133 Ga. 431, 66 S.E. 243 (1909). 4

Cardinale v. Louisiana, 394 U.S. 437 (1969). 6

Drake v. State, 241 Ga. 583 (1978). 1

Drake v. State, 248 Ga. 891 (1982). 5, 7

Emmett v. State, 232 Ga. 110 (1974). 7

Henry v. Mississippi, 378 U.S. 443 (1965). 8

Offutt v. State, 238 Ga. 454 (1977). 7

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

HENRY ARTHUR DRAKE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY THE ATTORNEY GENERAL

PART ONE

STATEMENT OF THE CASE

Petitioner received a jury trial in the Superior Court of Madison County, Georgia, on August 29 through 31 and September 1, 1977 and was convicted of the offenses of armed robbery and murder. Petitioner received a life sentence for armed robbery and the death penalty for the offenses of murder. Petitioner's convictions and sentences were affirmed by the Supreme Court of Georgia in Drake v. State, 241 Ga. 583 (1978). Subsequently, Petitioner Drake filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. This petition was denied on December 14, 1979. The extraordinary motion for new trial was served on counsel for the state on June 1, 1981. Attached to Petitioner's motion was the affidavit of August F. Siemon, III, who stated that in the spring of 1979 he represented the Petitioner and that in May or June of 1979, he interviewed William Campbell who admitted that he, William Campbell killed the victim, C.E. Eberhart and that Petitioner had no part in the robbery/murder.

A hearing was held on Petitioner's extraordinary motion for new trial before Judge William F. Grant of the Northern Judicial Circuit on July 7, 1981. William B. Campbell was sworn and testified on behalf of the Petitioner. At the hearing, Mr. Campbell acknowledged that on two prior occasions he had testified under oath that Petitioner had done the actual killing, but that the truth was that Petitioner had no part in the robbery and killing and that he, Campbell, had killed and robbed the victim. (Motion transcript, pp. 4-19). On direct examination, Mr. Campbell declared that he had decided to tell the truth two years ago (Motion transcript, p. 30), but that he had never told any attorney

other than his own the truth, until a week earlier. (Motion transcript, p. 31-32). On direct examination by counsel for Petitioner, Mr. Campbell insisted that he had not signed his affidavit until about a week ago because he did not want to, because he still wanted to lead a "crooked life." (Motion transcript, p. 32).

On cross-examination by Mr. Huff, Mr. Campbell denied ever having spoken with lawyer August Siemon about the Petitioner's innocence. (Motion transcript, p. 44-46). Mr. Campbell further asserted to Mr. Huff that two years ago he would have signed a statement concerning Drake's innocence. (Motion transcript, p. 51). Campbell stated that he told Petitioner's mother three years ago that he would sign a statement and that he told Petitioner the same thing. (Motion transcript, p. 52). On redirect examination, Mr. Campbell reiterated that he had never talked with any of Petitioner's lawyers at Jackson, Georgia two years ago. (Motion transcript, p. 61).

The Supreme Court of Georgia considered the foregoing evidence presented in the hearing on Petitioner's extraordinary motion for new trial, as well as considering the transcripts of Petitioner's trial and the trial of Mr. Campbell. The court then found that Petitioner had not met the standard for granting a new trial on the basis of newly discovered evidence which has been established under Georgia law. Therefore, the court upheld the trial court's denial of Petitoner's extraordinary motion for new trial. At no time, did Petitioner raise the federal questions on which he now seeks review of this Court, but rather asserted that the trial court had erred in denying his extraordinary motion for new trial based on newly discovered evidence.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD REFUSE TO CONSIDER THE ISSUES RAISED BY THE PRESENT PETITION, AS NONE OF THE FEDERAL QUESTIONS RAISED WERE PROPERLY PRESENTED TO THE STATE COURTS FOR A DECISION.

Petitioner seeks to have this Court decide the issue of whether or not the application of Georgia law with reference to the standard necessary for the granting of an extraordinary motion for new trial on the basis of newly discovered evidence, denied him certain of his constitutional rights. The only issue which should be before this Court is whether, as a matter of Georgia law, Petitioner's extraordinary motion for new trial was properly denied. After being denied relief on direct appeal and in a state habeas corpus proceeding, neither of which directly concerned the issues which Petitioner would have this Court consider, Petitioner filed his extraordinary motion for a new trial in the Superior Court of Madison County, Georgia. The "newly discovered evidence" upon which Petitioner claims he should be granted a new trial, is the testimony of coindictee William Campbell, that he, Campbell, and not Drake committed the murder of victim E.C. Eberhart.

In Georgia, the rules relating to the granting of a new trial based upon newly discovered evidence are as follows:

" . . . (1) that the evidence has come to the knowledge of the moving party since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness."

Bell v. State, 227 Ga. 800, 805, 183 S.E.2d 357 (1971), quoting Burge v. State, 133 Ga. 431, 432, 66 S.E. 243 (1909). The trial court found that there was "no valid legal reason that requires a new trial in said case and therefore, the extraordinary motion for new trial made by the defendant must be denied."

(See Appendix "A" to the petition for a writ of certiorari filed by the Petitioner).

From this denial of the extraordinary motion for new trial, Petitioner appealed to the Supreme Court of Georgia, simply alleging that the trial court erred in denying appellant's extraordinary motion for new trial and erred in denying appellant's motion to be present at the evidentiary hearing on his extraordinary motion for new trial. (See Attachment "A" to this brief which is the brief of the Appellant and Appellant's Enumeration of Errors).

Petitioner did not raise the constitutional claims of denial of due process and fundamental fairness under the Eighth and Fourteenth Amendments, due the operation of the state rule concerning extraordinary motions for new trial, which he now seeks to have this Court review. The Supreme Court of Georgia did not address the constitutional considerations concerning which Petitioner now seeks the review of this Court, but rather held that Petitioner had not met the standard for establishing that he is entitled to a new trial on the basis of newly discovered evidence as set forth under Georgia law. Drake v. State, 248 Ga. 891, 894 (1982). The court held as follows:

> "Pretermitting the question of whether the 'newly discovered evidence' meets the first five of the above requirements, it is clear that the effect of Campbell's new testimony is to impeach the credibility of his earlier sworn statements. The law is settled that a post-trial declaration by a State's witness that his former testimony was false is not a ground for a new trial. Stroud v. State, 247 Ga. 395 (276 S.E.2d 597)(1981); Sutton v. State, 238 Ga. 336, 338 (232 S.E.2d 569)(1977); Fowler v. State, 187 Ga. 406(1 S.E.2d 18) (1939); Felton v. State, 56 Ga. 84 (1876); Richey v. State, 132 Ga. App. 188 (207 S.E.2d 672)(1974); Code Ann. § 70-204."

Id. at 894.

A review of Petitioner's enumeration of error and brief on appeal and the decision of the Supreme Court of Georgia, does not

show that the issues upon which Petitioner now seeks the review of this Court were raised in the state courts. Therefore, this issue is not properly presented to this Court. This Court has held on numerous occasions that it will not decide federal constitutional issues raised for the first time in this Court on review of a state court decision. Cardinale v. Louisiana, 394 U.S. 437 (1969). In the present case, the Petitioner has attempted to raise federal questions which were never raised, preserved or passed upon in the state court. This Court has noted that in a federal system "it is important that state courts be given the first opportunity to consider the application of state statutes in light of constitutional challenges." Cardinale v. Louisiana, supra, at 439. Thus, Respondent submits that this Court should refuse to review these issues as the state courts of Georgia have not had an opportunity to pass on the federal questions raised.

II. THE SUPREME COURT OF GEORGIA PROPERLY UPHELD THE DENIAL OF PETITIONER'S EXTRAORDINARY MOTION FOR NEW TRIAL BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

In general, extraordinary motions for new trial are not favored in Georgia. Such motions will be granted only in cases such as do not ordinarily occur in human affairs. The prerequisite for the granting of an extraordinary motion for new trial have been previously set out in this brief. As already noted, the Supreme Court of Georgia found that the effect of Campbell's new testimony was to impeach the credibility of his earlier sworn statements and therefore, a new trial on the basis of newly discovered evidence was not established because under Georgia law a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness. Drake v. State, 248 Ga. 891, 894 (1982), quoting Emmett v. State, 232 Ga. 110, 117 (1974) and Bell v. State, 227 Ga. 800, 805 (1971). The Supreme Court of Georgia stated that all six requirements must be complied with if a new trial is to be secured. Drake v. State, supra, at 894, citing Offutt v. State, 238 Ga. 454, 455 (1977). Thus, the Supreme Court of Georgia followed state standards in finding that the trial court properly denied Petitioner's extraordinary motion for new trial. As already noted, the court did not decide any federal question presented concerning whether or not the state standard violated Petitioner's constitutional rights under the Eighth and Fourteenth Amendments, but rather decided the case based on the fact that the state standard had not been met.

This Court has declined to review state court judgments based on adequate and independent state grounds, as long as there is no discrimination on the part of the state court merely because a federal question is involved. Henry v. Mississippi, 378 U.S. 443 (1965). Therefore, as the state court properly interpreted Georgia law, Respondent submits that this Court should decline to review the issues presented by this petition.

Respondent does not concede that even if this Court should determine that the issues raised by Petitioner should be reviewed, that they are of merit, but rather, asserts that the sixth prerequisite for securing a new trial based on an extraordinary motion for new trial alleging newly discovered evidence, does not deny Petitioner any of his constitutional rights.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully submits that this Court should deny this petition for a writ of certiorari.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

SUSAN V. BOLEYN
Assistant
Attorney General

Please serve:

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Atlanta, Georgia 30334
(404) 656-3397

D
SB

IN THE SUPREME COURT OF GEORGIA

HENRY ARTHUR DRAKE,	:	
Appellant	:	
VS.	:	CASE NO. 38034
STATE OF GEORGIA	:	
Appellee	:	

ENUMERATION OF ERRORS

I.

The trial court erred in denying Appellant's Extraordinary Motion for New Trial.

II.

The trial court erred in denying Appellant's motion to be present at the evidentiary hearing on his Extraordinary Motion for New Trial.

Respectfully submitted,

MARTIN & YOUNG

Mary D. Wilkes

MARY D. WILKES

Attorneys for Henry Arthur Drake

44 Broad Street, N.W.
Suite 504, The Grant Building
Atlanta, Georgia 30303
(404) 522-0400

CERTIFICATE OF SERVICE

This is to certify that I have this date served copies of the within and foregoing Enumeration of Errors on Cleve Miller, District Attorney for the Northern Judicial Circuit, State of Georgia, Post Office Box 247, Elberton, Georgia 30635, Bryant Huff, District Attorney for the Gwinnett Judicial Circuit, State of Georgia, Post Office Box 569, Lawrenceville, Georgia 30246, and Michael J. Bowers, Attorney General of the State of Georgia, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334, by placing same in the United States Mail in properly addressed envelopes with adequate postage affixed thereon to assure delivery.

This 19th day of October, 1981.

Mary J. Wilkes

Mary J. Wilkes

IN THE SUPREME COURT OF GEORGIA

HENRY ARTHUR DRAKE,	:	
Appellant	:	
VS.	:	CASE NO. 38034
STATE OF GEORGIA	:	
Appellee	:	

REQUEST FOR ORAL ARGUMENT

COMES NOW the Appellant in the above-styled case, and hereby requests that the case be scheduled for oral argument.

Appellant hereby certifies that District Attorney Bryant Huff has been notified of Appellant's intention to argue the case orally and that upon inquiry Mr. Huff has stated that the State also desires to argue the case orally.

This 19th day of October, 1981.

MARTIN & YOUNG

By: Mary J. Wilkes
MARY J. WILKES

MARTIN & YOUNG
504 Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 522-0400

CERTIFICATE OF SERVICE

This is to certify that I have this date served copies of the within and foregoing Request for Oral Argument on Cleve Miller, District Attorney for the Northern Judicial Circuit, State of Georgia, Post Office Box 247, Elberton, Georgia 30635, Bryant Huff, District Attorney for the Gwinnett Judicial Circuit, State of Georgia, Post Office Box 569, Lawrenceville, Georgia 30246, and Michael J. Bowers, Attorney General of the State of Georgia, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334, by placing same in the United States Mail in properly addressed envelopes with adequate postage affixed thereon to assure delivery.

This 19th day of October, 1981.

Mary J. Wilkes

Mary J. Wilkes

IN THE SUPREME COURT OF GEORGIA

HENRY ARTHUR DRAKE,	:	
Appellant	:	
VS.	:	CASE NO. 38034
STATE OF GEORGIA	:	
Appellee	:	

BRIEF OF APPELLANT

ON APPEAL FROM
THE SUPERIOR COURT OF MADISON COUNTY

MARY J. WILKES
MARTIN & YOUNG
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Suite 504, The Grant Building
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Telephone: (404) 522-0400

ATTORNEYS FOR APPELLANT

IN THE SUPREME COURT OF GEORGIA

HENRY ARTHUR DRAKE,	:	
Appellant	:	
VS.	:	CASE NO. 38034
STATE OF GEORGIA	:	
Appellee	:	

JURISDICTIONAL STATEMENT

This case is an appeal from the Order of the Superior Court of Madison County, Georgia, entered on July 24, 1981, denying Appellant Drake's Extraordinary Motion for a New Trial on charges of murder and armed robbery for which he is currently facing sentences of death and life imprisonment, respectively. Jurisdiction over this appeal lies in the Supreme Court pursuant to Ga. Code Ann. §2-3104 (Art. VI, Sec. II, Para. IV).

ISSUES INVOLVED

I. Whether the trial court erred in denying Appellant's Extraordinary Motion for New Trial where the only witness to implicate the Appellant in the crimes, and without whose testimony Appellant's convictions could not stand, has recently admitted, in testimony and under oath, that his trial testimony accusing the Appellant of the crimes was false and that it was he alone, and not the Appellant, who commited the murder and robbery. (Enumeration of Error #1).

II. Whether the trial court erred in denying Appellant's motion to be present at the evidentiary hearing on his Extraordinary Motion for New Trial. (Enumeration of Error #2).

STATEMENT OF THE FACTS

On September 1, 1977, Appellant, Henry Arthur Drake, was convicted of the murder and armed robbery of a Colbert, Georgia barber and was sentenced to death and life imprisonment, respectively, for those crimes.

The key prosecution witness against the Appellant at trial was William Campbell, a co-defendant who had been separately tried and convicted for the same crimes almost a year before Appellant Drake's trial. Campbell's testimony at both his own trial and that of Drake was that Appellant Drake committed the crimes and that Campbell witnessed the crimes as an innocent bystander. Campbell was the only witness to implicate Appellant in the crimes. Appellant Drake maintained his innocence throughout the proceedings, taking the stand in his own defense and denying Campbell's allegations.

On April 2, 1981 Campbell executed a sworn affidavit (attached hereto as Appendix A and to Appellant's Extraordinary Motion for New Trial as Exhibit A, R: 18-19) admitting that he lied when he testified that Henry Drake committed the crimes against the barber and further admitting that he alone was responsible for the death and robbery of the barber. On the basis of this affidavit an Extraordinary Motion for New Trial was filed on Appellant's behalf. (R:14-25).

A hearing on said motion was scheduled for July 7, 1981 at the Elbert County courthouse. Appellant Drake filed a timely motion to be present at this hearing (R:42-43); however, said motion was denied (R:46), and the hearing was held without the

Appellant's presence over the objection of Appellant's counsel (HT:3-4).

At the hearing Campbell reiterated what he had said in his affidavit. His testimony was that he lied at both his own trial and Appellant Drake's trial when he testified that Henry Drake beat and robbed the barber and that it was he alone, and not Drake, who committed the crimes. (HT:9, 12-16, 22, 26-35, 43-44, 47, 52, 60-61). He explained that he lied and blamed the crimes on Drake because he was mad at the Appellant. (HT:22). He testified that at first he was mad because he thought Appellant had turned him into the authorities. He believed this because, when the Georgia authorities came to Virginia to pick him up they had the watch which Campbell had taken from the barber and had given to Appellant before leaving Georgia (HT:23-24). He also believed that Appellant had turned him in because the police were waiting for him at the bus station in Norton, Virginia and the Appellant was the only one who knew where he was going. (HT:25-26). He remained angry at Appellant Drake because Drake treated him ugly when the authorities brought him back for trial telling Campbell he hoped he would 'get the chair' before his trial and that he and his family were glad Campbell 'got the chair' after Campbell had been convicted and sentenced to death. (HT:27-29). Campbell testified that he wanted to pay Drake back for the way he treated him (HT: 27-29).

Despite Campbell's testimony that he had lied at Appellant's trial and that the Appellant did not commit the crimes of which he was convicted, which testimony was unrefuted by any

evidence from the state, the trial court entered an order denying the Appellant's motion for a new trial. (R:78). It is from this order that Henry Drake now appeals.

ENUMERATION OF ERRORS

I.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S EXTRAORDINARY MOTION FOR NEW TRIAL.

II.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO BE PRESENT AT THE EVIDENTIARY HEARING ON HIS EXTRAORDINARY MOTION FOR NEW TRIAL.

ARGUMENT AND AUTHORITY

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S EXTRAORDINARY MOTION FOR NEW TRIAL.

Appellant Drake recognizes that the granting of new trials on the basis of newly discovered evidence is not favored. However, new trials are mandated under Georgia law if the newly discovered evidence meets the criteria set out by this Court in Bell v. State, 227 Ga. 800 (1971). Those criteria are: (1) that the evidence has come to the knowledge of the movant since trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that the only effect of the evidence will not be to merely impeach the credit of a witness.

That Appellant's motion for new trial met the fifth requirement above is not disputed as both the witness' affidavit and his live testimony were presented in conjunction with the motion.

It is the Appellant's contention that the new evidence presented by his motion clearly met the remaining five requirements of Bell as well and demonstrated the extreme circumstances which compel the admittedly extreme remedy of a new trial.

A. Appellant's new evidence meets the criteria for granting a new trial.

(1) The evidence has come to the knowledge of the movant since the trial and it was not owing to want of due diligence that he did not acquire it sooner. (Requirements (1) and (2) from Bell v. State, supra).

By its very nature, evidence consisting of the sworn statement of a witness that his trial testimony was false is not available to a defendant until after the testimony has been given at trial. Moreover, no amount of diligence on the part of a defendant will produce such a statement until the witness is willing to make it.

In this case the witness, Campbell, did not admit that his trial testimony against Appellant Drake was false until long after the trial and even the direct appeals in Appellant's case were over. Thus, there is no question but that the first requirement of Bell, supra, that the evidence has come to the knowledge of the movant since the trial, has been met in this case; and, in fact, the state did not dispute that requirement (1) had been satisfied.

What the state did contend below was that Appellant's motion did not comply with the due diligence requirement of Bell, supra, (Requirement (2) of Bell v. State, supra). In support of this contention the state relied primarily upon an affidavit of

Appellant's prior counsel, August Siemon, which was attached to Appellant's Extraordinary Motion for New Trial as Exhibit "B" (R:20-21), in which Siemon stated that in May or June of 1979 William Campbell admitted to him that he had lied during Appellant's trial.

As an initial matter Appellant would point out that the affidavit of Attorney Siemon was not offered in evidence by the state at the July 7th hearing in support of any contention and is not, therefore, evidence as such. However, even had it been received in evidence the affidavit in no way demonstrates a lack of due diligence by Appellant or his counsel.

First, Appellant submits that it is not necessary in a motion for new trial on the basis of newly discovered evidence that Defendant's motion be brought immediately after the discovery of any new evidence. As a careful reading of Bell v. State, supra, and other cases dealing with the diligence question will reveal, the requirement of due diligence is directly related to the first requirement set out in Bell, supra at 805, namely, "(1) that the evidence has come to his [the party moving for a new trial] knowledge since the trial," (emphasis added). What the cases are requiring the movant to show is that the evidence was not known to him at the time of trial; and that the evidence could not have become known to the movant prior to trial through exercise of due diligence. [Lakes v. Lakes, 171 Ga. 692 (1930); Bradley v. Bradley, 232 Ga. 717, 718 (1974); Emmett v. State, 232 Ga. 110, 119 (1974)]. In other words, in order to prevent deliberate "sand-bagging", the Court will not grant a new trial on the basis of newly discovered evidence if the "new" evidence could have been discovered in time to use it at trial

had the movant exercised due diligence in preparing for trial. This is clearly not the case here.

Using the same logic in the context of extraordinary motions for new trial, the diligence requirement has in some cases been extended so as to require that the Defendant could not have discovered the evidence in time to incorporate it into his ordinary motion for new trial if one was filed. Gaddis v. State, 245 Ga. 200 (1980). However, in no case has the requirement of due diligence in relation to newly discovered evidence been extended beyond the time for an ordinary motion for new trial. Since the evidence establishes that Campbell was not willing to admit his perjury until years after any ordinary motion for new trial could have been brought, it is clear that the Defendant's motion is timely and diligent, regardless of whether Campbell admitted to Attorney Siemon in May or June of 1979 that his trial testimony against Drake was perjurous.

Furthermore, even if the due diligence requirement of Bell were read to require that motions for new trial be filed immediately after the discovery of the new evidence, Attorney Siemon's affidavit, if evidence at all, does not demonstrate a lack of such diligence.

The newly discovered evidence presented by Appellant's motion is not the statement of Campbell to a third party that his testimony at Appellant Drake's trial was false. Such statements have repeatedly been held to be inadmissible hearsay which will not support a motion for new trial. Timberlake v. State, 246 Ga. 488, 492 (1980); Robison v. State, 114 Ga. 445 (1901); Lyon v. State, 22 Ga. 399 (1857); Daniel v. State, 65 Ga. 199 (1880); and see Section B(1) of Argument, infra. It is instead Campbell's live testimony that the story he told at trial was false. Thus,

Attorney Siemon's failure to file a motion for new trial on Drake's behalf merely on the basis of a declaration Campbell may have made to him could not be attributed to lack of diligence because that declaration would not have constituted admissible evidence upon which to base such a motion. If Siemon had moved for a new trial at the time of his discussion with Campbell and had relied on his testimony of what Campbell had told him, the motion would have surely failed. It is only because Campbell recently agreed to testify in court about his trial lies that Drake's motion for new trial has become meritorious. The State would argue that Drake was not diligent because he did not file his motion at a time when he would surely have lost because of the lack of competent evidence. There is simply no merit to this argument.

(2) The new evidence is not cumulative only nor is impeachment of a witness' credibility its only effect. (Requirements (4) and (6) of Bell v. State, supra).

The evidence presented by Appellant's motion for new trial is not merely cumulative or impeaching. The affidavit and testimony of William Campbell not only contain new, distinct and material facts about the commission of the crime for which Henry Drake was convicted which were not testified to at trial, but they also present evidence of a higher and different grade on the point of Henry Drake's innocence in the form of a confession by the only living "eye witness" to the crime - the perpetrator himself. This evidence does not serve merely to strengthen the defendant's contention of innocence, but, if believed, would in and of itself establish his innocence. Thus, while the evidence will have the effect of impeaching the credit of the State's key

witness, this will not be the only effect. See Bell v. State, supra. This evidence therefore affords a basis for a new trial.

C. The new evidence is so material that it would probably produce a different verdict.

As for the remaining criterion that the evidence "is so material that it would probably produce a different verdict", because Campbell's testimony was the only evidence implicating Drake in the commission of the crimes, there can be no dispute that, if believed, Campbell's retraction of his trial testimony and his admission of his own, rather than Drake's, guilt, would most certainly have produced a different verdict at Henry Drake's trial. Moreover, even if the jury did not believe all of Campbell's recent version of the crimes, it is more than probable that having it before them for consideration would have created enough question in their minds as to Appellant's guilt so as to result in a different verdict, particularly in light of the lengthy deliberations it took for them to reach a guilty verdict in the case even with Campbell's testimony accusing Drake of the crimes (TT: 497-500).

Nevertheless, the state's objections to the Appellant's motion seemed to relate, for the most part, to this third requirement of Bell v. State, supra, which has also been stated by the court as "whether or not the new evidence would likely produce a different result upon another trial". West v. West, 200 Ga. 115 (1945); Bradley v. Bradley, 232 Ga. 717, 718 (1974).

The two basic arguments of the State which were seemingly directed to the materiality requirement of Bell were: (a) that the affidavit and testimony of Campbell recanting his prior

trial testimony were not credible or worthy of belief and therefore would not have produced a different verdict, and (b) that there was sufficient other evidence, aside from Campbell's trial testimony, to support Drake's conviction.

In order to analyze either of these two claims a consideration of the following outline of the trial testimony in the case is necessary:

On the evening of December 5, 1975, the Appellant, Henry Drake, his girlfriend, Mary Carruth, and William Campbell, a friend who was living with Drake and Carruth at the time (TT 157-159), drove from Madison, Georgia, where the three were living, into Colbert, Georgia (TT 161-162) where Henry Drake's mother and other family members lived. (TT 407). The Appellant and his girlfriend dropped Campbell off across the street from the barbershop in Colbert so that he could get a haircut (TT 161-162, 360, 409), and they continued on to the Appellant's mother's house (TT 410-411).

At about 5:00 p.m. Campbell was observed leaning on a car outside the barbershop (TT 283-284). At 6:00 p.m. he was no longer outside but the lights in the barbershop were on (TT 284).

At 9:00 p.m. that evening C. E. Eberhart, age 74, was found critically wounded on the floor of his barbershop (TT 290). He had received blows to the head from a clawhammer and a stab wound (TT 149-150). The floors and walls of the barbershop were smeared with blood as though an extended struggle had taken place (TT 290, 307). Mr. Eberhart was hospitalized but remained in a coma until his death several months later (TT 152-155).

Several days after the attack on Mr. Eberhart law enforcement officers went to the home of Appellant Drake, where Campbell

had been staying, to search for Campbell and possible evidence (TT 122, 309, 358, 360). Campbell was gone but a watch later identified as belonging to Mr. Eberhart was found in Campbell's room in a dresser with Campbell's clothes and papers (TT 129, 133, 322). Campbell was arrested by Georgia authorities after he was located in Virginia. He had been arrested by Virginia authorities only one week after the attack on Mr. Eberhart for shooting a woman during a robbery (TT 195, 197). Subsequently, the Appellant was also arrested.

Appellant Drake was originally indicted along with Campbell but due to a challenge to the grand jury made by Drake's appointed attorneys he was reindicted, and his case did not go to trial until one year after Campbell had been tried and convicted of the murder and armed robbery of Mr. Eberhart.

At his own trial Campbell claimed that he was getting a haircut from Mr. Eberhart on the night Eberhart was wounded when the Appellant came in and began beating the barber over the head with a hammer. He testified that he tried to stop the Appellant but that the Appellant struck him with the hammer when he did so.

The jury obviously disbelieved Campbell's version of the events as they convicted him of both the murder and armed robbery of Mr. Eberhart, recommending the death sentence for the murder. Nevertheless, one year later the State called Campbell as their key witness in the trial of the Appellant and had him reiterate this same story before the Appellant's jury (TT 167-170, 188).

William Campbell was the only witness in Henry Drake's trial who in any way implicated Drake in the murder and robbery of Mr. Eberhart, and his testimony was strikingly different from

the account given by the other witnesses at trial.

Henry Drake and Mary Carruth both testified that after dropping Campbell off for his haircut, they drove to Drake's mother's house where they had supper and visited for about two hours (TT 381-382, 410). Drake's mother, brother and brother-in-law all confirmed that Henry and Mary were at Drake's mother's that evening (TT 429, 432, 434). Appellant Drake and Mary Carruth further testified that they picked Campbell up across the street from the barbershop on their way out of town (TT 410-411) and that he told them that he had been in a fight with the barber (TT 352, 422).

Drake testified that about 3:00 a.m. that night Campbell woke him (Drake) and wanted Drake to drive him (Campbell) back to Colbert because he left his knife and some barber clippers he took from Mr. Eberhart there. [Barber tools were found outside the barbershop (TT 366).] Drake refused to carry him (TT 412, 413). The next day, Drake went back to his mother's and borrowed a radio. When he got back to Madison, Campbell told Drake that he (Drake) and Mary were going to drive him to Atlanta (TT 414). Campbell had a gun (TT 414) so the Appellant drove him to Atlanta and let him out (TT 415).

Campbell's testimony, which covers over 100 pages of transcript, varied significantly from that of Mary Carruth and Henry Drake. The thrust of that testimony was that Drake, and Drake alone, robbed and murdered Mr. Eberhart and that Campbell himself was merely an innocent bystander. However, Campbell's story was not only incredible in and of itself, but it was also filled with contradictions and inconsistencies throughout.

To begin with, Campbell stated that after Drake let him out he hung around the laundromat for ten or fifteen minutes (TT 204). He then walked over to the barbershop. Mr. Eberhart was cleaning up but said he would cut Campbell's hair after he finished sweeping up, so Campbell held the dustpan for him (TT 205).

At first Campbell stated that he and Eberhart did not converse while his hair was being cut (TT 212); however, on recross he admitted that he asked Eberhart for a job while he was cutting his hair (TT 245) [Campbell testified earlier that he had been looking for a job in Colbert, but no one would give him one (TT 224). There was also testimony that Campbell had been a barber at one time (TT 366 to 367)].

When the State began questioning Campbell as to the Appellant's involvement in the crime, Campbell first stated that he did not see Drake in the barbershop but saw him only in front of the barbershop before and after he (Campbell) got his hair cut (TT 164 to 165). After considerable proding by the District Attorney, Campbell changed his story and claimed that while he was having his hair cut, Drake came in with a black wig on (Campbell said he didn't recognize him at first), walked around behind the barber chair and hit Eberhart in the head with the hammer (TT 168).

At Drake's trial, Campbell said he watched Drake come in and walk around Eberhart. However, as Drake's trial counsel brought out on recross, at his own trial Campbell testified that he did not know Drake was there until he heard Eberhart groan twice and turned around to see Drake hitting him (TT 246). Drake's counsel

also brought out on recross that Campbell did not mention any wig at his own trial (TT 238, 243).

As to the wig, Campbell testified first that he did not know what happened to it after the beating (TT 170). Later, he testified that during the struggle Eberhart pulled the wig off Drake (TT 208,249). Still later he said Drake wore the wig back to the car (TT 213).

On direct, Campbell said that when Drake came into the shop he told Eberhart that he was going to "rob him and take his money" (TT 169), but on cross examination, he said Drake did not say anything when he came in (TT 207).

Campbell claimed that he tried to stop Drake from hitting the old man at which time Drake hit him (Campbell) in the head with the hammer (TT 169, 208). On cross-examination, elaborating on being hit by Drake, Campbell, already aware of the physical evidence the State was going to present from his own trial, conveniently related that when he was hit he fell out of the barber chair over near the door stating that "that's where they got my blood stains, off the door" (TT 208). [The State did, in fact, present testimony of a forensic scientist that Type A blood scrapings were taken from the door frame (TT 266); Campbell was typed as A (TT 264), while Eberhart and Drake were typed as O (TT 264, 271).] But Campbell's story of falling by the door was inconsistent with testimony he gave at his own trial that Drake picked him up and set him by the door (TT 211). This testimony from the previous trial was also inconsistent with Campbell's statement on cross that Drake did not touch him after hitting him with the hammer (TT 209).

Campbell's testimony was particularly inconsistent as to the hammer itself. The hammer was found in the back of a pickup truck located behind the barbershop and Campbell admitted that he threw it there (TT 175), but he had several versions as to where he threw it from. First he stated only that he picked the hammer up at the barbershop and threw it toward the truck (TT 175). On cross examination, he specified that he picked the hammer up off the barbershop floor as he was going out the door (TT 215), and that he did not know where Drake had got it from (TT 215). However, after being asked if he had ever said that he had found the hammer in Drake's car, he changed his story and responded, "That's right. As a matter of fact, he kept it in there all the time. He worked on that old car with it." (TT 214). Defense counsel then read Campbell's testimony from his own trial in which he claimed that he found the hammer in Drake's car and threw it "out of the car" (TT 216). [This version was inconsistent with Campbell's earlier statement that the car was parked up the street at the store (TT 126).] When asked to clarify which he had done, i.e., thrown it from the barbershop or thrown it from the car, Campbell changed his story for the third time (TT 216). He claimed that Drake carried the hammer out of the barbershop, laid it down, then stepped on it so that it bounced back to near the door where Campbell picked it up. He stated that he (Campbell) hid the hammer inside the car until he could get back to the door (TT 216). At this point defense counsel gave up hope of getting a straight story about the hammer from Campbell and went on to something else. But further irreconcilable inconsistencies in Campbell's testimony continued to develop.

On direct, Campbell testified that after the incident in the barbershop he did not have any blood on his clothes and did not pay any attention to whether Drake had any blood on him (TT 172). But on cross and recross, he claimed that there was blood on his own shirt (TT 218, 248), saying that he threw the bloody clothes away, but then changed his story to say that Drake or Mary threw them away (TT 248-249).

On direct, Campbell testified that Mary Carruth was behind the barbershop somewhere during these events but that he did not know exactly where (TT 176). On cross, he testified that she was "at the door, beside the door...around to the corner door," and that she "come to the door" (TT 219).

Campbell testified that he, Mary and Drake walked to the car (TT 177) which was parked up the street at the store (TT 176) and then drove to the cemetery and drank a beer (TT 177,220). He next testified that he went to sleep in the back seat and when he woke up they were back in Madison (TT 178). When asked, "Do you recall the next day?", Campbell responded, "No, sir, Henry told me about...the next day."

Campbell went on to testify that the next day (Saturday) Drake told him that he (Campbell) would have to leave because the barber was expected to die (TT 179-186, 225). While being examined on direct as to this particular portion of events, Campbell was asked what Drake said. He responded, "He said they were looking for that barber to die...was robbed that night. I didn't know about it. He told me about it." (TT 184) When questioned further about what was said, he testified that "he

(Drake) told me, 'Bill, you've got to leave. I hate to say this, but you got to leave.' I asked him why, and he said, 'Well, what happened last night--they look for that old man to die--.' I was pretty well drinking and I didn't think the old man was hurt that bad." (TT 185) (Emphasis added, under'ined portion is Campbell's statement to the court).

Drake then drove Campbell to Atlanta and he (Campbell) caught a bus to Norton, Virginia (TT 179-186, 226) where he shot a woman in the hip only a week later while robbing a salvage company (TT 195, 197). Campbell pled guilty to that robbery (TT 186).

Georgia law enforcement officers picked Campbell up in Virginia and returned him to Georgia to face the Eberhart murder and robbery charges. On route Campbell made a statement regarding the Eberhart killing that "You know when a fellow gets to drinking...I didn't mean to do it." See Campbell v. The State, 240 Ga. 352 at 353 (1977).

Campbell's criminal record at the time of Drake's trial included pleas of guilty to two counts of sodomy in 1967 (TT 197), a plea of guilty to burglary in 1967 (TT 198), a conviction for robbery in 1969 which resulted in a life sentence subsequently reduced to twelve years (TT 198), a plea of guilty to the robbery in Norton, Virginia and convictions for the robbery and murder of Mr. Eberhart in 1976 for which he received a life sentence and the death penalty (TT 187, 199). Campbell testified that in all he had spent around twenty years in jail (TT 194).

In sum, an eye witness testified to seeing Campbell across the street from the barbershop at about 5:00 p.m. on the day of the crime (TT 283). Blood scrapings taken from the handle of the

murder weapon were found to be type A (TT 265, 269), Campbell's blood type (TT 264). On the other hand, there was no physical evidence associating Drake with the crime. No finger prints taken at the scene were matched to Drake (TT 259), nor was there any identification of O positive blood (Drake's blood type, TT 271) found at the barbershop. The only testimony to place Drake at the barbershop or to implicate him in the murder or robbery was Campbell's testimony, the inconsistent and contradictory testimony of an alleged accomplice and a man with a history of violent crime.

a) The credibility of the new evidence and its source

The state contended below that because of a history of felony convictions as well as prior inconsistent statements in this case, Campbell is unworthy of belief and, for this reason Appellant's motion should have been denied. This argument is somewhat ludicrous in light of the fact that the State did not hesitate to use this same unreliable and incredible witness as its key witness to obtain the convictions and death sentence against the Appellant, although Campbell's criminal record and inconsistent statements were well known to the State at the time of trial. The State should not be heard to protest Campbell's credibility now when they espoused it earlier by using his testimony.

Granted, in the ordinary case some showing as to the credibility of a movant's witness or witnesses would be helpful to the trial judge in deciding a motion for new trial. However, even in the ordinary case it is no longer necessary that a

defendant make such a showing in order to prevail on a new trial motion as Ga. Code §70-205, which used to require such showings, was repealed by Acts 1965, pp.18, 39.

More important, the State's claim that Campbell is not credible and, thus, that his recantation and claim of Drake's innocence is not credible, misses the whole point of a motion for new trial on newly discovered evidence. The issue is not whether Campbell's 'new' version of the crime is true in every detail, or even whether it is more believable than his prior trial testimony. The question is simply whether his exculpation of Appellant, coupled with the fact that there was no direct evidence and only weak circumstantial evidence of Drake's guilt aside from Campbell's trial testimony, probably would have been enough to result in a different verdict. The basis of Appellant's motion for new trial is that there is now substantial new evidence of his innocence as well as evidence that the state's key witness gave perjured testimony at Drake's trial. It is not necessary that Campbell's hearing testimony be completely, or even largely credible to result in a new trial anymore than it was necessary for it to be completely credible at trial for the State to claim a conviction based upon it. All that is necessary is that Campbell's recent admission that he and not Henry Drake committed the offense, no matter how much of it is true, would probably create a reasonable doubt about Drake's guilt in the minds of a jury. Thus, the court need not conclude that Campbell in fact committed perjury in order to grant a new trial. Specifically, the question is not whether Campbell's present

statement is true, it is whether he will give this testimony at a new trial, something no one contests, and if he does give that testimony, whether there is a reasonable likelihood that the verdict will be different.

Even if the issue on the motion was which of Campbell's two stories is more worthy of belief, which it is not, there is every reason to believe Campbell's recent testimony in support of Appellant's motion over his trial testimony. As between the contradictory positions both taken under oath, the indicia of reliability weigh in favor of the recanting version.

First, the evidence on the motion revealed that Campbell was testifying at the hearing contrary to the advice of his attorney (HT: 6-7, 45). The evidence further demonstrated that Campbell was aware that his admissions at the hearing could subject him to a prosecution for perjury and that he was aware of the possible penalties upon conviction of that offense. (HT: 6-7, 45). (The potential penalty for such a conviction when the perjury was given in a capital case is life imprisonment under Georgia law. Ga. Code Ann. §26-2401.) The evidence also showed that Campbell's attorney advised him of the possible ramifications that his hearing testimony could have on his ongoing appeals. The affect of Campbell's admission of responsibility in the killing and his exoneration of Drake place his own appeals, which contend that the evidence against him was insufficient, in extreme peril and his life in grave jeopardy.

It is unlikely that Campbell would place his own appeals in extreme peril by confessing to the beating of Mr. Eberhart simply

out of friendship for the Appellant. It is much more plausible that Campbell, motivated by anger from the belief that Drake had turned him into the police (HT: 22-24) and had told them where to find him (HT: 25-26), would falsely accuse Drake at trial of perpetrating the crime to get back at Drake (HT: 28-29) -- not to mention to try and save himself.

Second, the State contended below that inconsistencies as to ancillary facts between Campbell's testimony at the hearing and Appellant Drake's trial testimony make Campbell's current testimony unbelievable. Some of the inconsistencies pointed out by the State were that Campbell claimed that when he gave Drake the watch he had taken from Eberhart it had a band on it and that Henry kept the watch and was wearing it on the morning Campbell left Georgia, whereas Drake claimed that the watch had no band and that he therefore gave it back to Campbell. Campbell also testified that Drake urged him to leave Colbert and that Drake voluntarily drove him to Atlanta, whereas Drake testified that Campbell decided to leave on his own and had forced Drake to drive him. While the State argued that these inconsistencies between the stories of Drake and Campbell made Campbell's story less reliable, these inconsistencies actually lend more credence to Campbell's admissions. If, in fact, Campbell was simply lying to help Drake, why would he not exculpate Drake altogether? Why would he implicate him as far as receiving the watch and driving Campbell to Atlanta?

Thirdly, contrary to the State's contentions, Campbell's testimony on Appellant's motion is not so inconsistent with the

physical evidence evidence at trial as to be totally incredible and unworthy of belief. In fact, for the most part the physical evidence is as consistent with Campbell's hearing testimony as it is with his prior trial testimony.

The only evidence presented at Appellant's trial that is even arguably inconsistent with Campbell's recanting testimony that it was he alone who beat and robbed the barber is the minimal evidence urged by the State in support of its contention that a long and tiring struggle must have taken place, due to the large quantities of blood found all over the small barbershop and smeared on the walls, coupled with their contention that Campbell was not physically able to engage in such a struggle.

To begin with, the State's conclusion that Campbell could not have done the assailing alone is drawn from the lay opinion testimony of one law enforcement officer who gave his opinion of Campbell's medical condition and the physical limitations which that condition imposed on Campbell. This evidence is far from conclusive on Campbell's ability to commit the crimes alone.

The supposed evidence that a lengthy struggle had to have taken place is similarly inconclusive. In Campbell's testimony at the motion hearing he stated that after stabbing the barber and hitting him over the head a number of times he left him lying in the back of the barbershop near the storage room where they had been struggling (HT: 14-15). He testified that when he left the shop Eberhart was still conscious and was struggling to get up (HT: 15-16). The evidence at trial revealed that a large pool of blood was found in the area of the shop where Campbell claims

he left the barber bleeding (TT: 375, 536 - Exhibit S-6). It is quite conceivable, as Campbell testified, that his struggle with the barber was not particularly lengthy or drawn out, and that when he left, the shop was not covered with blood as it was found some three hours later when police arrived. It is possible that Mr. Eberhart, who was severely injured but was struggling to get up as Campbell left, continued to struggle over the two and one-half to three hours before police arrived to reach his feet and seek help. He may have crawled along the floor leaving separate pools of blood wherever he paused for rest. He may have at one point managed to stand up by pulling himself up on the barber chair and then inched his way along the wall with his head resting on the wall, leaving a trial of blood and hair behind. However, due to his injuries and loss of blood he was never quite able to make it out the door. The police found him by his barber chair still struggling to get up hours after the beating took place (TT: 303).

It is not necessary that the court believe that the above scenario is what actually happened. What is important is that this hypothetical explanation of the condition of the barbershop points out at least one plausible explanation of the evidence which is consistent with Campbell's current testimony that he alone and not Drake killed and robbed the barber.

It should be pointed out that the Appellant is not claiming that Campbell has suddenly become a person of good character and a totally reliable witness nor even that every detail of what Campbell has sworn to in connection with the motion is entirely

true and accurate. What the Appellant is claiming is that the core of Campbell's testimony that Drake did not have anything to do with the beating of the barber and that Campbell alone beat the barber for whatever reasons and under whatever circumstances is the truth, and that Campbell's testimony at Appellant's trial implicating Drake in the beating was a lie.

Since Appellant Drake, according to his own testimony at trial as well as the testimony of Mary Carruth and of Mrs. Helen Drake, was not present when the barber was beaten, he has no way of knowing whether the specifics of Campbell's recanting version of what happened are true. It is possible that Campbell, even while admitting to the crime, is still trying to make it easier on himself by claiming the homicide resulted from a fight or out of self-defense. However, it does not matter to Appellant's claim whether Campbell is now telling the whole truth. What matters is whether Campbell conceivably committed perjury at Henry Drake's trial when he said Drake committed the crimes and whether Drake is, in fact, conceivably innocent. It cannot be said as a matter of law that there is no reasonable possibility that the jury could find that Campbell's recanting of his earlier testimony creates a reasonable doubt as to the Appellant's guilt, especially in light of the very weak circumstantial evidence corroborating that testimony. Thus, a new trial is required by law.

The difficulty which Drake faces in presenting his motion can well be demonstrated by assuming for a moment that Drake is, in fact, innocent. Let us assume as Appellant Drake has always

claimed, and as Campbell now testifies, that Drake let Campbell out to get a haircut with no knowledge or intention that Campbell was going to do anything but get his hair cut; that Campbell alone, for whatever reason, fought with and robbed the barber; that Drake and Mary Carruth picked Campbell up from across the street at the laundromat on their way back from Appellant's mother's; that upon returning to Madison, Campbell told them that he had fought with and hurt the barber; that Campbell believed that Henry had turned him in and therefore tried to lay the crime upon Henry Drake by first lying to the police and then to the juries in his own and Drake's trial. Assuming these facts, where there are no other eye-witnesses to the crime, Henry Drake would have no way of proving that Campbell lied when he testified at his trial that Drake was the assailant except by Campbell's own admission that he had lied.

The Appellant has now presented to the Court new evidence of his innocence and the only evidence available to him to show that Campbell commited perjury at his trial. The Appellant cannot help it that that evidence of necessity comes from an unreliable source. The State had no qualm in using as their witness at trial against Drake, the same witness they now contend is untrustworthy and unbelievable. Campbell is the only source the Appellant has or could possibly have under the circumstances.

Where, as in this case, the recanting witness' story exculpating the Appellant is no less reliable than his story at trial, and cannot in any event be said to be wholly unworthy of

belief; and where the State presented no evidence to refute the witness' recanted version of the crime, the new evidence of the witness' recanting and exculpating the Appellant should be put before a new jury so that a jury which has before it all of the available evidence can decide the Appellant's guilt and his fate.

b) The sufficiency of the other evidence presented at trial

In an apparent effort to show that Campbell's testimony exonerating Drake of the murder and robbery does not meet the materiality requirement of Bell, the state urged various shreds of evidence which it contended established the Appellant's guilt even without Campbell's trial testimony. (See Tenth Defense, Response of the State to Extraordinary Motion for New Trial, R: 49).

Neither the circumstances cited by the State, individually or taken together, nor all of the other trial evidence combined, constitutes even marginal proof that Appellant perpetrated the murder and robbery, let alone sufficient evidence of guilt, absent Campbell's trial testimony. Further, as stated earlier, with the exception of Campbell's now recanted testimony, none of the so-called evidence of Appellant's guilt presented at trial is any more consistent with Appellant's guilt than it is with Campbell's admission that he and not Drake commited the crimes. In essence the only evidence of Appellant's guilt which the State has been able to assert is evidence that Drake was with Campbell prior to and after the crimes were commited and that they lived together. The only theory of guilt which such evidence can be

said to support is one of guilt by association, which is clearly not sufficient to justify a conviction and sentence of death.

This case is simply not one in which the other evidence presented at trial is so sufficient or so overwhelmingly conflicting with the new evidence of the movant's innocence that the Court is able to adequately predict as a matter of law that the evidence is not so material as to probably result in a different verdict. Carter v. State, 246 Ga. 328 (1980); Dobbs v. State, 245 Ga. 208 (1980); Snow v. State, 14 Ga. App. 489 (1914); Smith v. State, 148 Ga. 332 (1918).

Bell v. State, supra, is particularly instructive on the point in question. The appellant in Bell was convicted of armed robbery on the basis of two eyewitness identifications and fingerprints found at the scene and identified as his. Subsequently another individual admitted the robbery, making a statement to police that he and a friend of his had commited the crime and that appellant had nothing to do with it. Both this individual and the friend he implicated pled guilty to the robbery and were sentenced therefore.

The court had already ruled in its opinion that the evidence upon which the appellant was convicted authorized the verdict against him, but it went on to hold that that fact in no way precluded "the probability of a different verdict on another trial with the newly discovered evidence, since the evidence merely authorized, but did not demand the verdict". Bell at 807-808.

The Court pointed out in Bell that "the jurors are the ultimate judges of the credibility of witnesses" (at p.807) and

that the probability of their returning a different verdict cannot be calculated.

It observed that the newly discovered evidence, combined with the Defendant's denial of his guilt and the testimony of his alibi witnesses "might well authorize a different verdict, which is about as much probability as can be obtained under the evidence". Id. at 808.

Also of particular importance to Appellant Drake's motion is the further notation of the court in Bell that "[I]n numerous other cases an important element in the decision to allow a new trial has been the fact that the evidence sustaining the verdict was weak or unsatisfactory". Id. at 809 (cites omitted).

While the trial judge has wide discretion in the determination of motions for new trial, that discretion is not absolute, and the appellate courts will step in when there has been an abuse of that discretion. The Supreme Court found such abuse in the leading case of Bell v. State, supra, on circumstances far less extreme than in the instant case.

In light of the new evidence presented in Bell the Court found that justice demanded that a new trial be granted. In so doing the Court, citing from other Supreme Court opinions, made clear that "'(w)hile the statute states that a new trial 'may be granted', this does not mean that in a proper case, where all the rules of law have been met, a new trial may or may not be granted, but on the contrary it means that in such a case a new trial must be granted. (cites omitted) 'we have searched the record and the State's brief and can find no countershowing by the State to the truth of these affidavits upon which the court could base the

exercise of its discretion. The court has seemingly passed upon the credibility of the affidavits and has said, in effect, that a jury could not believe them as a matter of law. We believe that the court abused its discretion when it denied defendant's motion for a new trial.' (cite omitted)." Bell, supra at 809. (emphasis added).

The Appellant believes that under the circumstances of his case -- where the only witness to link him with the crime for which he was convicted has, in sworn testimony, admitted that he alone committed the crime and that he committed perjury at the Appellant's trial when he implicated him in the murder and armed robbery; where the other evidence presented against the Appellant at trial is wholly circumstantial, extremely inconclusive and far weaker than the eyewitness and fingerprint evidence in Bell; where the State has presented no countershowing as to the truth of Campbell's recanted testimony; where Appellant presented alibi witnesses at trial; where the Appellant has continuously asserted his innocence, and where the Appellant's very life rests on the credibility of this new evidence -- justice demands that a new trial be granted and a new jury be empanelled to determine the credibility of this new evidence and, with this evidence before them, to re-evaluate whether the Appellant should live or die.

The Appellant believes that the denial of his motion for a new trial was, in light of Bell, supra, and the principles cited therein, an abuse of discretion.

As a final point, Appellant believes that the denial of his motion under the circumstances of this case, which indicate that

the conviction of Drake was based upon the perjured testimony of the State's key witness, violated the fundamental rights guaranteed him by the Constitution and Laws of the State of Georgia and by the Constitution of the United States, including the right to due process of law (Art. I, Sec. I, Pars. 1, 9, and 11, Georgia Constitution of 1976 (Code Ann. §§2-101, 2-109 and 2-111 respectively); Fifth and Fourteenth Amendments, United States Constitution); the right to a fair trial as embodied by Art. I, Sec. I, Par. 11, Georgia Constitution of 1976 (Code Ann. §2-111) and the Sixth and Fourteenth Amendments to the United States Constitution; and the right to be free from cruel and unusual punishment (Art. I, Sec. I, Par. 14, Georgia Constitution of 1976 (Code Ann. §2-114); Georgia Code Annotated §27-2505; Eighth and Fourteenth Amendments, United States Constitution).

B. The various other defenses to Appellant's motion put forth by the State do not justify the denial of a new trial under the circumstances of this case.

Appellant has demonstrated that the new evidence presented by his motion meets the technical requirements for such motions and, thus, entitles him to a new trial. Nevertheless, in the interest of being complete, Appellant will address the other reasons which the State emphasized below for denying his motion which have not yet been dealt with.

(1) Recanting of Testimony as Basis for New Trial

The State cited a number of cases below for the principle that 'a post-trial declaration by a State's witness that his former testimony was false is not a cause for a new trial'.

However, neither the cases nor the principle they seemingly espouse bar a new trial under the circumstances of this case.

First, the majority of cases which cite the principle urged by the State are inapplicable in that they do not involve new evidence in the form of an affidavit or sworn testimony of the recanting witness but, rather, deal with the situation where the new evidence is merely the hearsay testimony or the affidavit of a person to whom or within whose hearing the witness allegedly recanted his trial testimony. Morrow v. State, 36 Ga. App. 217, Kennedy v. State, 37 Ga. App. 161, and Richey v. State, 132 Ga. App. 188. It is understandable that mere hearsay evidence of a witness' recanting is not considered sufficient to constitute cause for a new trial. Indeed, the reasoning given by this Court in Felton v. State, 56 Ga. 85 (1876) for rejecting evidence of recanting as a ground for a new trial is persuasive in such cases.

A number of other cases cited by the State below only state the principle without indicating the source of the new evidence involved so that they cannot be said to control the instant case. (See, i.e., Fowler v. State, 187 Ga. 406 (1939), Rogers v. State, 129 Ga. 589 (1907) and Sutton v. State, 238 Ga. 336 (1977)).

In Pullin v. State, 237 Ga. 759 (1976), a deposition of a co-defendant admitting that he commited the crime was rejected as a ground for new trial, but that case did not involve the witness recanting perjured testimony that he had given against the defendant nor did it clear the defendant of being present when the apparent robbery-murder took place. Instead the new evidence was merely cumulative of the witness' previous testi-

mony that none of the defendants knew anyone was going to be killed.

Still other cases which supposedly stand for the principle cited by the State are distinguishable because substantial evidence of the defendants' guilt was present aside from the recanted testimony of the witness. Sutton v. State, supra, (three other eyewitnesses); Smith v. State, 148 Ga. 332 (1918).

The State cited no cases in which the principle they espouse was applied to deny a new trial where the new evidence was the direct testimony of the recanting witness himself, and where the testimony that witness was recanting was the sole or even the primary evidence linking the defendant with the crime as is the situation in the instant case.

Evidence by a witness himself recanting his trial testimony should not automatically be discounted but should be analyzed under the same criterion for granting a new trial as any other newly discovered evidence. This is the approach which was taken by this Court recently in Dobbs v. State, 245 Ga. 208 (1980). The Court upheld the denial of a new trial in that case where the co-defendant recanted his trial testimony implicating the appellant in the crimes of which he was convicted. The Court found that under the facts of the case the new evidence did not meet the requirement that the evidence be so material that it would probably produce a different verdict because, as opposed to this case, not only did the co-defendant's post-trial statement in Dobbs fail to exclude the appellant as the murderer, but there was sufficient other evidence at trial, including testimony of eyewitnesses, to authorize the verdict even without the co-defendant's testimony.

While this Court did not grant a new trial in Dobbs, its analysis implied that recanted testimony can, in fact, constitute grounds for a new trial just as any other newly discovered evidence if it meets the proper standards.

(2) Necessity of Perjury Conviction (Sixth Defense, Response of the State to Extraordinary Motion for New Trial, R: 48)

The State also contended below that the absence of a perjury conviction against Campbell was a sufficient justification to deny Appellant's motion for a new trial, citing Ga. Code Ann. §110-706.

As an initial matter Ga. Code Ann. §110-706 represented specific statutory authority for setting aside a verdict on the limited basis that the verdict was illegal because it was based upon perjured testimony. Mitchell v. State, 120 Ga. App. 447 (1969); Self v. State, 108 Ga. App. 201 (1963). The statute itself did not deal with motions for new trial based on new evidence of a defendant's innocence which just happened to involve the admission of perjury.

In any event, however, Ga. Code §110-706 was repealed by the CPA of 1966 (Acts 1966, p.609,687, as amended by Acts 1967, p.226 et seq.). Thus, it is no longer required that the witness be convicted of perjury before setting aside a verdict based on perjured testimony. Freeman v. State, 130 Ga. App. 718 (1974).

Seemingly, the State's position is that even though a perjury conviction is not a mandatory prerequisite to a new trial, a trial court may, and should, in its discretion deny a motion for new trial if there has been no perjury conviction.

Appellant strongly disputes this assertion and submits that a trial court has no such discretion where the requirements

The State is apparently referring to Campbell's testimony that he gave Drake the watch he had taken from Eberhart and that Drake voluntarily drove him to Atlanta the day after the crime. For the Appellant to prevail on this motion it is not necessary that he be innocent of any wrongdoing whatsoever. Even assuming that he participated to the extent of assisting Campbell in leaving the area and even accepted the watch stolen from Eberhart, it is unlikely that a jury would convict the Appellant of murder and armed robbery on the basis of this limited involvement. It is even less likely that they would sentence Appellant to death based on this limited after-the-fact participation in the crimes. Therefore, at a very minimum a new sentencing trial would be required even if the State's Eighth Defense were accepted.

II. The trial court erred in denying the Appellant's motion to be present at the hearing on his Extraordinary Motion for New Trial.

Appellant is aware of this Court's recent opinion in Dobbs v. State, 245 Ga. 209 (1980) upholding the denial of a request by a defendant in a capital case to be present at his extraordinary motion for new trial. Although Appellant disagrees with the Court he recognizes that in that case the Court declined to hold that under the evolving standard of due process applicable to death penalty cases as indicated by the United States Supreme Court in cases decided since Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), a death penalty defendant generally is "allowed to be present at each step of his appeals process".

However, the Appellant does not believe the Court's refusal to so hold precludes the Appellant from prevailing on this issue.

The background holding of the Court in Dobbs, supra, was that in Georgia "the general right of one accused of a felony to be present during the course of his trial does not extend to post-verdict procedures such as a motion for new trial, at which only questions of law, not questions of fact, are determined."

While under the above holding a defendant is not generally entitled to be present at post-trial motion, Appellant contends that in certain circumstances, his case being one example, the exercise of sound judicial discretion is abused if the presence of the defendant is denied.

Initially it should be noted that in this case, in contrast to Dobbs who waited until the eve of the hearing to request that he be present, Appellant requested to be present at the hearing promptly after the hearing date was set and in plenty of time for the logistics of his transportation to be arranged by the State. Furthermore, since the witness for the hearing was transported to the hearing from the same institution as Appellant, little more effort, expense or inconvenience could have resulted from Appellant also being brought along. Thus, the burden on the State did not weigh heavily in denying the Appellant's request to be present.

On the other hand the interest of the Appellant in being present at the hearing on his Extraordinary Motion for New Trial was considerably greater than the average motion for new trial. Whereas, in general motions for new trial tend to involve alleged

errors or irregularities in the conduct of the trial and proceeding, attending trial, Appellant's motion in a real sense involves factual questions relative to his guilt or innocence. Moreover, the State created additional factual issues by raising arguments in defense against Appellant's motion such as the allegation that inconsistencies between Campbell's new evidence and the physical evidence at trial justify denial of the motion. Furthermore, unlike in Dobbs where not only did the new evidence fail to exclude the Appellant as the murderer, but there was sufficient other evidence at trial, including testimony of eyewitnesses to support the verdict, in this case the new evidence presented at the motion hearing was from the only witness to implicate the Appellant discrediting the only testimony given at trial which could have supported the verdicts of guilty. Under these circumstances a Sixth Amendment interest of the Appellant in being able to confront the person who had been his only accusor at trial presented itself which does not exist in most other post-judgment proceedings. Moreover, the critical nature of the new evidence mitigated in favor of the Appellant being afforded every possible opportunity to better present that evidence at the motion hearing under principles of due process. Appellant's presence was requested at the hearing because Appellant's counsel had not represented the Appellant at trial and because particular surrounding facts and circumstances of Campbell's hearing testimony might be known to Appellant but not his counsel. Appellant, in his motion to be present, notified the court of these reasons why his presence would be needed to assist

counsel with the presentation of the motion and, in particular, with the examination of Campbell.

In the context of habeas corpus proceedings the federal courts, while generally holding that the presence of the defendant at such proceedings is not required, are careful to note that whether the prisoner should be produced depends upon the issues raised by the particular case, U.S. v. Hayman, 342 U.S. 205, 223, 72 S.Ct. 263, 96 L.Ed. 232 (1952), and that if the motion raises a disputed factual issue or there are substantial issues of fact to be resolved, that the defendant's presence is required. U.S. v Hayman, supra; U.S. v. Phillips, 403 F.2d 963, 964 (6th Cir. 1968); Stirone v. Markley, 345 F.2d 473 (7th Cir. 1965).

Under the circumstances of this case, considerations of due process and the Sixth Amendment right to confrontation compelled the granting of Appellant's timely request to be present at the hearing on his motion for new trial and the denial of that request, particularly in light of the insufficient burden Appellant's presence would have created, constituted an abuse of discretion.

CERTIFICATE OF SERVICE

This is to certify that I have this date served copies of the within and foregoing Brief of Appellant on Cleve Miller, District Attorney for the Northern Judicial Circuit, State of Georgia, Post Office Box 247, Elberton, Georgia 30635, Bryant Huff, District Attorney for the Gwinnett Judicial Circuit, State of Georgia, Post Office Box 569, Lawrenceville, Georgia 30246, and Michael J. Bowers, Attorney General of the State of Georgia, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334, by placing same in the United States Mail in properly addressed envelopes with adequate postage affixed thereon to assure delivery.

This 19th day of October, 1981.

Mary J. Wilkes

Mary J. Wilkes

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

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HENRY ARTHUR DRAKE,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

REPLY BRIEF OF PETITIONER

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10

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Georgia Rule prohibiting the granting of a new trial on the basis that a witness has recanted his trial testimony denies Petitioner fundamental fairness and due process of law where Petitioner's convictions could not stand without the trial testimony of the witness who has now recanted that testimony, admitted that it was perjured and excuplated the defendant.

II. Whether the imposition of the death penalty on a defendant would constitute cruel and unusual punishment in violation of the Eighth Amendment where the sufficiency of the conviction upon which that penalty was based rests squarely on the testimony of a witness who has now recanted that testimony, admitting that it was perjured, and has exculpated the defendant of the crimes, and where the state has invoked a rule barring a new trial on the basis of the witness' recanting of his trial testimony.

ARGUMENT

The Respondent, State of Georgia, raised as its first question presented in its "Brief in Opposition to Petition for Writ of Certiorari by the Attorney General" the following:

> "Whether this Court should consider Petitioner's allegations that his constitutional rights under the Eighth and Fourteenth Amendments to fundamental fairness and due process were violated by the denial of his extraordinary motion for new trial, when the federal questions were not presented to the state courts for consideration."

In arguing this question the State asserted that "Petitioner did not raise the constitutional claims of denial of due process and fundamental fairness under the Eighth and Fourteenth Amendments" in the Supreme Court of Georgia in either his enumeration of errors or brief on appeal in that Court.

Petitioner files this reply brief to correct this misstatement by the Respondent. The State apparently overlooked the following language from pages 30 and 31 of Petitioner's Brief on Appeal to the Georgia Supreme Court (R:84-85), which brief the State attached to its own Brief in Opposition to Petition for Writ of Certiorari in this case:

> "As a final point, Appellant believes that the denial of his motion under the circumstances of this case, which indicate that the conviction of Drake was based upon the perjured testimony of the State's key witness, violated the fundamental rights guaranteed him by the Constitution and Laws of the State of Georgia and by the Constitution of the United States, including the right to due process of law (Art. I, Sec. I, Pars. 1, 9, and 11, Georgia Constitution of 1976 (Code Ann. §§2-101, 2-109 and 2-111 respectively); Fifth and Fourteenth Amendments, United States Constitution); the right to a fair trial as embodied by Art. I, Sec. I, Par. 11, Georgia Constitution of 1976 (Code Ann. §2-111) and the Sixth and Fourteenth Amendments to the United States Constitution; and the right to be free from cruel and unusual punishment (Art. I, Sec. I, Par. 14, Georgia Constitution of 1976 (Code Ann. §2-114); Georgia Code Annotated §27-25; Eighth and Fourteenth Amendments, United States Constitution)."

Thus, as pointed out at page 5 of his Petition for Writ of Certiorari, and contrary to the State's assertions, Petitioner's federal claims were, in fact, raised and argued in his appeal to the Georgia Supreme Court and are now properly before this Court for review.

Respectfully submitted,

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